

# The World Health Organization, the International Court of Justice, and Nuclear Weapons

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I.	INTRODUCTION . . . . .	151
II.	THE COMPETENCE OF THE WHO AND THE ICJ . . . . .	154
III.	THE LAW OF ARMED CONFLICT AND NUCLEAR WEAPONS . . . . .	163
	A. <i>The Legal Regulation of Armed Conflict and Weapons</i> . . . . .	164
	B. <i>The Laws of War and the Right to Use Force</i> . . . . .	166
	C. <i>The Environment and the Use of Force</i> . . . . .	173
IV.	NUCLEAR WEAPONS AND WORLD PUBLIC ORDER . . . . .	175
	A. <i>The Use of Nuclear Weapons</i> . . . . .	176
	B. <i>Nuclear Weapons and International Law</i> . . . . .	177
V.	CONCLUSION . . . . .	184

## I. INTRODUCTION

On May 14, 1993, the World Health Assembly of the World Health Organization ("WHO")<sup>1</sup> asked the International Court of Justice ("ICJ") for an advisory opinion: "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"<sup>2</sup> In the event the ICJ decides that the WHO has the authority

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1. The WHO Constitution provides that the WHO's work shall be carried out by a World Health Assembly, comprised of delegates of all WHO Member States, and a twenty-four person Executive Board. WHO CONST. arts. 9, 10, 24.

The World Health Assembly conducts business in plenary session and two committees of the whole: Committee A primarily deals with program and budget issues, and Committee B primarily deals with administrative, financial, and legal concerns. See, e.g., *Guide for Delegates to the World Health Assembly*, WHA45/A45/DIV/1 (Mar. 17, 1992).

2. *Health and Environmental Effects of Nuclear Weapons*, WHA Res. 46.40 (May 14, 1993). The limitation of this question to nuclear weapons use by "States" is interesting given the capabilities of

to request the opinion, the Court would confront a multilayered question important to the future behavior of states, the character and development of international law, and the authority of the Court.<sup>3</sup>

The simplicity of the WHO's request masks important substantive issues. These range from the international law applicable to nuclear weapons to the significance of the fact that nuclear weapons have been part of the fabric of international life and the international order since 1945. Indeed, some argue that the potential to use nuclear weapons has prevented a third twentieth-century war<sup>4</sup> among the great powers.<sup>5</sup> Health and environmental effects are relevant; so too are differences among nuclear weapons in terms of type, yield, blast, and radiation impact, as well as the particular military use.<sup>6</sup>

Any answer to the WHO's question must both address these issues and take account of the relationship between the law and politico-military reality. Rather than discuss every subject embedded in the WHO request, this Article focuses on inescapable features of the WHO's challenge to the international community: the respective competence of the WHO and the ICJ with respect to requesting and rendering the advisory opinion at issue; the content and relevance of the laws of war, including the environmental aspects of such law;

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nonstate actors. See generally 9 AM. U. J. INT'L L. & POL'Y 1 (1993) (papers from Conference on Changing Notions of Sovereignty and the Role of Private Actors in International Law). The exclusion of peaceful nuclear explosions that could potentially harm the environment and public health is also notable.

Among the advocates of the advisory opinion request are nongovernmental organizations that have developed the "World Court Project," an initiative to seek an advisory opinion from the ICJ confirming that the use or threat to use nuclear weapons is illegal. See NICHOLAS GRIEF, *THE WORLD COURT PROJECT ON NUCLEAR WEAPONS AND INTERNATIONAL LAW* (1992); World Court Project Press Release (Nov. 21, 1994) [hereinafter Press Release] (on file with author). The WHO's question is much narrower than the World Court Project's proposal. See Mark Schapiro, *Mutiny on the Nuclear Bounty: Non-Aligned Nations*, *THE NATION*, Dec. 27, 1993, at 798 (reporting efforts to obtain advisory opinion on threat or use of nuclear weapons).

The United States and the Soviet Union threatened to use nuclear weapons at various times and in varying circumstances during the Cold War. See EUGENE V. ROSTOW, *TOWARD MANAGED PEACE: THE NATIONAL SECURITY INTERESTS OF THE UNITED STATES, 1759 TO THE PRESENT* 315-23 (1993) (describing threats by United States and Soviet Union to use nuclear weapons against Korea, Middle East, Cuba, and China).

3. On December 23, 1994, the U.N. General Assembly approved a recommendation of the First Committee, based on the World Court Project proposal, to seek an ICJ advisory opinion closely akin to that requested by the WHO. See *infra* note 7. The General Assembly request reads: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" G.A. Res. 75, U.N. GAOR, 49th Sess., U.N. Doc. A/699 (1994) (Section K). Due to the timing of the General Assembly's request, this Article does not give it lengthy treatment. The Article's substantive analysis and argument, with the exception of the portions pertaining to the WHO, are equally applicable to the General Assembly's request.

4. The terms "war" and "armed conflict" are used interchangeably in this Article without regard to the legal distinction between international and non-international armed conflict.

5. RICHARD FALK ET AL., *NUCLEAR WEAPONS AND INTERNATIONAL LAW* 7 (1981) (World Order Studies Program Occasional Paper No. 10).

6. The indiscriminating phrasing of the request may be ground enough for the Court to reject it. What does "use" mean? Which nuclear weapons are at issue? These and other questions arguably are imbedded in the WHO request, making a "yes" or "no" answer difficult to justify.

The WHO Legal Counsel suggested that, in lieu of the proposed referral to the ICJ, the WHO should declare that "in view of the health and environmental effects, the unjustified use of nuclear weapons by a State in armed conflict would be contrary to the spirit and health objective of WHO and, as such, an illegal violation of the Constitution of WHO." The idea was not adopted. *46th World Health Assembly: Summary Records of Committees* 265, WHA46/1993/REC/3 (May 12, 1993) [hereinafter *Summary Records*].

and efforts since 1945 to control nuclear weapons through bilateral and multilateral agreement.

Accordingly, Part II of the Article examines the authorities of the WHO and the ICJ. It concludes, in agreement with the WHO Legal Counsel, that the WHO is without competence to request this advisory opinion, and that the Court's jurisprudence does not bar this result. Even if the ICJ declines to give an opinion in response to the WHO on competence grounds, the Court likely will confront much the same question because the U.N. General Assembly has made a similar request.<sup>7</sup> The U.N. Charter limits the General Assembly's authority to request advisory opinions only by reference to whether the question is legal in character.<sup>8</sup> The U.N. Charter, the ICJ Statute, and ICJ jurisprudence grant the Court discretion to render opinions when asked by a co-equal U.N. organ. While the Court has shown great deference to such organs in the past, it has not relinquished its discretion.<sup>9</sup> The Court could find that the political outweighs the legal content of the General Assembly's request, but to assume that it would do so would be presumptuous.<sup>10</sup>

7. See *supra* note 3. In a press release dated November 21, 1994, the World Court Project (founded by International Peace Bureau, International Association of Lawyers Against Nuclear Arms, and International Physicians for the Prevention of Nuclear War) reported that the First Committee of the U.N. General Assembly adopted a resolution to ask the General Assembly to seek an ICJ advisory opinion on whether "the use and threat to use nuclear weapons violates international law." Press Release, *supra* note 2. The Press Release characterized the resolution as a challenge to "the nuclear states' continuing policies of deterrence." *Id.* A wire service report on the resolution stated that the question would be "whether the threat or use of nuclear weapons in any circumstances is permitted under international law." *Disarmament: West Loses First Round in U.N. Nuclear Fight*, Inter Press Service, Nov. 21, 1994, available in LEXIS, News Library, Wires File (citations omitted). This report also stated that the Non-Aligned Movement (111 state members) sponsored the proposal because nuclear-weapons states focus more on the danger arising from the proliferation of conventional weapons than that arising from the proliferation of nuclear weapons. Moreover, "[t]he NGOs [non-governmental organizations] are supporting the WHO case before the World Court. The joint effort, called 'The World Court Project,' seeks to identify nuclear weapons nations as 'outlaw' or 'renegade' powers." *Id.* The French Ambassador to the United Nations reportedly said that the request "amounted to interference in the sovereign right of a nation, within international norms, to choose its systems of defense." *Id.* Given the outcome in the General Assembly, the United States seems not to have made a serious high-level effort to defeat the proposed advisory opinion request.

8. See U.N. CHARTER art. 96(1) ("The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.").

9. See Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 64 (Mar. 30) [hereinafter Interpretation of Peace Treaties].

[N]o State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations," represents its participation in the activities of the Organization, and, in principle, should not be refused. There are certain limits, however, to the Court's duty to reply to a Request for an Opinion. It is not merely an "organ of the United Nations," it is essentially the "principal judicial organ" of the Organization (Art. 92 of the Charter and Art. I of the Statute).

*Id.* at 71.

The ICJ might avoid the logic of this jurisprudence by taking the view that the WHO question, while legal, also is political. *Cf. infra* note 42.

10. The Court reasonably could conclude that, given ongoing political efforts to control nuclear weapons, including the 1995 Non-Proliferation Treaty review conference, any opinion would place the Court in the middle of a political issue of the greatest significance. At the same time, the ICJ has yet to adopt a political question doctrine analogous to the U.S. Supreme Court's. See generally Oscar Schachter, *Disputes Involving the Use of Force*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 238-39 (Lori F. Damrosch ed., 1987) [hereinafter CROSSROADS] (citing prudential reasons for ICJ abstention).

One therefore must look beyond competence. Parts III and IV of the Article analyze the laws of war, the right of self-defense, and the relationship between them, as well as the effort over the last fifty years to control, limit, and possibly suppress the nuclear weapon. These Parts highlight the traditional view that, in general, weapons are lawful unless specifically banned. Part IV also discusses alternative theories derived from analogous prohibitions, including the prohibition on unnecessary suffering. The Article concludes that an ICJ finding that nuclear weapons are illegal does violence to the role of state consent (however complex and subtle the contemporary forms of that consent) in making international law. Though a substantial number of people appear to believe the contrary,<sup>11</sup> no simple solution exists to the challenge of nuclear weapons.

Because the laws of war inevitably restrict the U.N.-Charter-affirmed inherent right of individual and collective self-defense, they necessarily inform analysis and application of that right. U.S. government views regarding international law and nuclear weapons in 1945 and later efforts to control nuclear weapons through arms control treaties reinforce a customary expectation by all states that possession and use of nuclear weapons are lawful unless barred by an international agreement like the 1968 Non-Proliferation Treaty. Consciously or unconsciously, the world community has adopted a step-by-step and cautious approach to the threat of nuclear weapons. This approach has been relatively successful because it realistically recognizes the past failure of blanket prohibitions and operates on the basis of reciprocity.

The ICJ may arrive at an opinion consonant with the step-by-step approach to nuclear weapons control, but a judgment that nuclear weapons use is illegal in all contexts would do little to advance the cause of legal restraint on nuclear weapons. Such a judgment would have no effect on states determined to create a nuclear arsenal and would make it difficult for nuclear-weapon states to maintain their deterrent capability. This capability underpins obligations that Britain and the United States (and Russia, as the successor of the Soviet Union, if it has agreed to the obligation) accepted in 1968 to take action to defend nonnuclear states from the threat or use of nuclear weapons. A decision interfering with these obligations would neither redound to the credit of the ICJ nor enhance respect for international law.

## II. THE COMPETENCE OF THE WHO AND THE ICJ

By the terms of the ICJ Statute, the Court's power to render advisory opinions is discretionary;<sup>12</sup> just as in contentious cases, the ICJ decides questions regarding its own competence.<sup>13</sup> While the ICJ has held that it is

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11. See *infra* note 192.

12. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 65(1) [hereinafter ICJ STATUTE] (stating that ICJ "may give" advisory opinions with respect to legal questions); see also *Interpretation of Peace Treaties*, 1950 I.C.J. at 72 ("Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request.").

13. See ICJ STATUTE art. 36(6) ("In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."); *id.* art. 68 ("In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in

without jurisdiction in contentious cases because of failure of consent<sup>14</sup> or because the dispute had become moot,<sup>15</sup> it has never failed to render an advisory opinion.<sup>16</sup> The Permanent Court of International Justice, on the other hand, declined to render an advisory opinion in 1923 on the status of Eastern Carelia because to do so would have been equivalent to deciding a contentious case between Finland and the Soviet Union, parties that had not consented to its jurisdiction.<sup>17</sup>

In determining its competence to render the nuclear weapons advisory opinion, the Court must find that the question is "legal" in character and that the WHO has authority to make the request.<sup>18</sup> The Australian delegate to the World Health Assembly in 1993 stated that "the legality of nuclear weapons . . . was a political issue which did not fall into the arena of world health and

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contentious cases to the extent to which it recognizes them to be applicable."); *see also* MICHLA POMERANCE, *THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N.* ERAS 277-305, 311 (1973) (stating important issue is whether, as matter of propriety, ICJ chooses to give opinion); SHABTAI ROSENNE, *THE INTERNATIONAL COURT OF JUSTICE* 454-59 (1957) (declaring that ICJ preference for abstract questions leads it, on its own discretion, to treat questions submitted as abstract); IBRAHIM F. I. SHIHATA, *THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION* 42-47 (1965) (noting that ICJ decides whether and how to comply with requests for advisory opinions).

14. *E.g.*, Aerial Incident of March 10th, 1953 (U.S. v. Czech.), 1956 I.C.J. 6, 8 (Mar. 14) (dismissing request due to absence of Czechoslovak consent to jurisdiction); *Treatment in Hungary of Aircraft and Crew of the United States of America* (U.S. v. U.S.S.R.), 1954 I.C.J. 102, 105 (July 12) (finding fatal absence of Soviet consent to jurisdiction); *Case Concerning the Aerial Incident of July 27th, 1955* (Isr. v. Bulg.), 1959 I.C.J. 126, 146 (May 26) (refusing to honor request because of lack of Bulgarian consent to jurisdiction).

15. *E.g.*, Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 252 (Dec. 20) (finding that claim no longer has merit, and Court not called on to give decision).

16. The United States noted this fact in a 1980 communication to the ICJ:

While the Court has noted that, under its Statute, its power to give advisory opinions is discretionary, it has repeatedly indicated that, in the absence of compelling reasons, a proper request for an advisory opinion should not be refused. . . . Indeed, in no case has the Court declined a request to give an advisory opinion on a legal question referred to it in accordance with Article 96 of the Charter.

Written Statement of the United States, 1981 ICJ Pleadings (Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt) 182, 183 (Aug. 27, 1980) [hereinafter *Written Statement*] (citations omitted). The ICJ has not declined to render an advisory opinion since that time.

17. Advisory Opinion No. 5, *Status of Eastern Carelia*, 1923 P.C.I.J. (ser. B) No. 5, at 23, 27-29 (Apr. 21); ROSALYN HIGGINS, *PROBLEMS AND PROGRESS* 199-201 (1994); SHIHATA, *supra* note 13, at 44-45. The Soviet Union was not a Member of the League of Nations, which had requested the opinion. Finland appeared to be using the League to advance its interest in a contention with a non-League Member. In the current situation, some statements of World Health Assembly delegates suggest a national or general humanitarian rather than a WHO interest in the request. Also, some private groups are using the WHO to seek an ICJ advisory opinion. Hence, the ICJ might conceivably revive the Eastern Carelia precedent by finding that the WHO, like the League of Nations in 1923, is merely a stalking horse. *See* GRIEF, *supra* note 2, at xv-xvi; Alexander O. Higgins, *World Health Meeting Overrides U.S., Passes Anti-Nuke Resolution*, AP, May 14, 1993, available in WL, AP News File [hereinafter *World Health Meeting*] (discussing anti-nuclear resolution proposed by South Pacific countries and "promoted by the Nobel laureate organization International Physicians for the Prevention of Nuclear War").

18. ICJ STATUTE art. 65 (stating that ICJ may give advisory opinion on "any legal question" at request of any body "authorized" to make such request); *see also* ROSENNE, *supra* note 13, at 462-63 ("[W]hen the request [for an advisory opinion] emanates from an organ or Specialized Agency authorized by the General Assembly to request advisory opinions, then, obviously the question of the competence of the organ to request the opinion and, by derivation, of the Court to give it, may arise in an acute form. . . . [T]he Court has to be satisfied that the organ requesting the opinion was competent to do so . . .").

it was therefore inappropriate for the Health Assembly to consider it."<sup>19</sup> A large majority of the World Health Assembly in 1993 disagreed.<sup>20</sup> ICJ proceedings, like the World Health Assembly debates, probably will focus on WHO competence rather than on whether the question is "legal" in character. The United States and others argued that the World Health Organization had no authority to seek the proposed advisory opinion,<sup>21</sup> and such states likely will repeat their arguments to the ICJ and force the issue.<sup>22</sup>

Analysis of the WHO's competence begins with the U.N.-WHO Agreement of 1948. In 1947, the U.N. General Assembly authorized the WHO to request ICJ advisory opinions "on legal questions arising within the scope of its *competence* other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies."<sup>23</sup> In framing the power to seek ICJ advisory opinions, the General Assembly characterized the WHO as a specialized agency like others "having wide international responsibilities as defined in their basic instruments in economic, social, cultural, educational, health and related fields."<sup>24</sup> Against this background the question of WHO competence boils down to whether the lawful use of nuclear weapons falls within the scope of appropriate action under the WHO Constitution.<sup>25</sup>

Room remains for jurisdictional debate. On September 3, 1993, the Court referred to the one other occasion on which the WHO had requested an ICJ advisory opinion.<sup>26</sup> That request concerned the WHO's agreement with Egypt and the establishment of a WHO regional office in Alexandria. In the wake of the Egypt-Israel peace treaty,<sup>27</sup> nineteen of twenty Arab states asked

19. *Summary Records*, *supra* note 6, at 269 (statement by Mr. Okely).

20. The request passed 75-33 with 5 abstentions. *46th World Health Assembly: Verbatim Records of Plenary Meetings* 280, WHA46/1993/REC/2 (May 3-14, 1993) [hereinafter *Verbatim Records*].

21. See *Summary Records*, *supra* note 6, at 260, 266 (statements of U.S. delegate against Assembly's competence to request proposed advisory opinion of ICJ); see also *id.* at 260, 261 (statements of representatives of Denmark and Austria).

22. Thirty-four states, including Australia, France, Britain, Russia, the United States, and other nuclear weapons states, submitted statements to the ICJ on the WHO request. The Court gave the states until June 20, 1995 to comment on each other's submissions. The submissions will remain secret at least until the opening of oral proceedings. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Communique No. 94/20 (Sept. 23, 1994).

23. Agreement between the United Nations and the World Health Organization, Aug. 8, 1947, U.N.-WHO, 19/II U.N.T.S. 193, art. X, para. 2 (entered into force July 10, 1948) [hereinafter U.N.-WHO Agreement] (emphasis added). The ICJ has referred to this Agreement as authorizing the WHO to request advisory opinions with respect to "legal questions arising within the scope of its activities," a broader term than "competence." ICJ Communique No. 93/26 (Sept. 3, 1993) (emphasis added). In analyzing issues of competence, Judge Schwebel did not purport to quote the agreements between the United States and the specialized agencies, including the WHO. Stephen M. Schwebel, *Was the Capacity to Request an Advisory Opinion Wider in the Permanent Court of International Justice Than It Is in the International Court of Justice?*, 62 BRIT. Y.B. INT'L L. 77, 113-14 (1992). For example, "activities" might cover research, such as the WHO studies of the health effects of nuclear war. If the ICJ were to find that such activity provides a basis for the request within the terms of the U.N.-WHO Agreement, then few issues would lie outside the WHO's authority to request advisory opinions.

24. U.N.-WHO Agreement, *supra* note 23, pmbl. at 194.

25. See *id.*, art. I at 194. Article 2 of the WHO Constitution specifies the functions of the Organization in order to achieve the objective of "the highest possible level of health."

26. ICJ Communique No. 93/26 (Sept. 3, 1993).

27. Treaty of Peace, Mar. 26, 1979, Egypt-Isr., 18 I.L.M. 362.

the WHO to transfer its Egyptian regional office to Amman, Jordan.<sup>28</sup> The WHO faced pressure from the United States as well as other nations, and the Assembly asked for an advisory opinion,<sup>29</sup> apparently to gain time. Confronted by this politico-juridical minefield, the Court reformulated the question.<sup>30</sup> By calling attention to this opinion in 1993, the Court may have sent two messages. First, the Court may not be certain of its competence to render an opinion. Second, it may be emphasizing its willingness to use its full authority to decide jurisdictional controversies, and even to reframe a request for an advisory opinion to reflect its understanding of the legal issues at stake (and perhaps its political wishes).<sup>31</sup> The ICJ could frame the WHO's request more narrowly, as the WHO Legal Counsel had previously urged the World Health Assembly to do.<sup>32</sup> Nonetheless, the ICJ may decide to address the issue of competence.

For over a decade, the WHO has discussed and studied the health effects of nuclear weapons explosions.<sup>33</sup> A substantial number of states and physicians represented at the WHO asserted that the organization could play

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28. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 I.C.J. 73, 86 (Dec. 20). The twentieth state was Egypt. The other nineteen states sought the change of venue because they "had decided to break diplomatic relations with Egypt and did not wish to conduct their WHO business through the Alexandria office." Written Statement, *supra* note 16, at 186; *see also* Exposé Écrit du Gouvernement de la République Arabe Syrienne [Written Statement of the Government of the Syrian Arab Republic], 1981 ICJ Pleadings (Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt) 208 (Aug. 23, 1981) [hereinafter Exposé] (questioning whether, given Egypt-Israel Peace Treaty and broken diplomatic relations between Egypt and Arab states, WHO Regional Office could safely remain in Alexandria and serve Arab countries of the eastern Mediterranean).

29. *See* Written Statement, *supra* note 16.

30. The principal question presented to the Court read: "1. Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March 1951 between the World Health Organization and Egypt applicable in the event that either party to the Agreement wishes to have the regional Office transferred from the territory of Egypt?" Exposé, *supra* note 28, at 76. The Court considered the question to be as follows: "What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected?" *Id.* at 95. The Court also clarified its jurisprudential perspective:

A rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part. Accordingly, if a question put in the hypothetical way in which it is posed in the request is to receive a pertinent and effectual reply, the Court must first ascertain the meaning and full implications of the question in the light of the actual framework of fact and law in which it falls for consideration. Otherwise its reply to the question may be incomplete and, in consequence, ineffectual and even misleading as to the pertinent legal rules actually governing the matter under consideration by the requesting Organization.

Exposé, *supra* note 28, at 76.

31. The Court asserted a similar authority in the Nuclear Tests Case. Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 252, 252 (Dec. 20). By mentioning the earlier WHO request, the ICJ also simply may have been noting that the WHO previously had asked for an advisory opinion.

32. *See Summary Records*, *supra* note 6. The ICJ also could rewrite the question to correct the problems noted.

33. *See, e.g.*, WORLD HEALTH ORGANIZATION, EFFECTS OF NUCLEAR WAR ON HEALTH AND HEALTH SERVICES (1984) (Report of the International Committee of Experts in Medical Sciences and Public Health on Implementation of Resolution WHA34.38). Work on this study began in 1982. *Id.* at iii. The WHO issued a new edition in 1987. WORLD HEALTH ORGANIZATION, EFFECTS OF NUCLEAR WAR ON HEALTH AND HEALTH SERVICES (1987) (Report of the International Committee of Experts in Medical Sciences and Public Health on Implementation of Resolution WHA34.38).

a role in preventing nuclear war.<sup>34</sup> Some WHO staff and Member States had argued in prior debates that the authority of the WHO was limited to the health effects of nuclear explosions.<sup>35</sup>

By 1993 a substantial majority was in favor of submitting a request to the ICJ regarding the lawfulness of nuclear weapons.<sup>36</sup> The representative of Vanuatu expressed a view typical of those advocating the request:

Vanuatu had sponsored the draft resolution in order to be consistent with its principles and its commitment to safeguarding the future of the global environment and of the human race. . . . Any nuclear accident, any atmospheric testing, and any nuclear weapon deployment not only affected health and the environment but could also threaten the survival of humanity through its impact on the food chain. . . . Vanuatu had sponsored the draft resolution aimed at obtaining the view of the International Court of Justice on the use of nuclear weapons because it saw such use not only as a health issue but also as a threat to humanity.<sup>37</sup>

The United States and others disagreed. In Committee, the U.S. delegate unsuccessfully argued<sup>38</sup> that "the draft resolution dealt with the issue in excessively narrow and technical terms."<sup>39</sup> The United States had no more luck in plenary session when its delegate argued that

whether the use of nuclear weapons is legal . . . is an arms control question, and it does not belong in this Organization. This resolution would inject the World Health Organization into debates about arms control and disarmament that are the responsibility of other organizations in the United Nations system, including the First Committee of the General Assembly, as well as other multilateral bodies such as the Conference on Disarmament. The WHO Legal Counsel has told Committee B that his opinion is that this resolution is not within the

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34. See *Health and Environmental Effects of Nuclear Weapons*, WHA46.30 (Apr. 26, 1993) (report by the Director-General); see also *Contribution of WHO to the International Year of Peace, Resolution of the 39th World Health Assembly*, WHA39.19 (May 15, 1986) (urging Member States "to strive for the cessation of the arms race, with particular regard to nuclear weapons").

35. See, e.g., *Programme of Work of the Health Assembly*, WHA 45/1992/REC/3 (May 12, 1992) at 4 [hereinafter *Programme of Work*] (giving view of WHO Legal Counsel, that health effects of radiation, not lawfulness of nuclear weapons use, fall within competence of WHO). This source also contains the views of the United States, Zambia, and the United Kingdom, and the conflicting views of other states such as Tonga and Iran. *Id.* at 4-5.

36. See *supra* note 20.

37. *Summary Records*, *supra* note 6, at 260 (speech of Mrs. Lini). Vanuatu apparently merged nuclear accidents, atmospheric testing, and nuclear weapons deployment into the subject of the advisory opinion request. This conflation demonstrates the difficulty the ICJ will have in trying to respond substantively to the request because of the request's awkward and uncertain wording. The delegate of Zambia stated that appealing to the ICJ was

a gesture that would have tremendous impact on the world's nuclear status. As the prevention of nuclear proliferation merely served to maintain or even increase the nuclear arsenals of the nuclear countries while hindering other States from obtaining such weapons, the focus should be on their complete abolition.

*Id.* at 259. In 1992, Zambia had taken the opposite position — that the "Health Assembly was not the best forum for discussion [of the issue]." See *Programme of Work*, *supra* note 35, at 5. Mexico's delegate felt the ability to avoid irreversible health and environmental damage was at stake. He supported the use of a secret ballot and a request for an advisory opinion because nonnuclear weapon states "had a nuclear sword of Damocles hanging over them and were powerless to change that situation." *Summary Records*, *supra* note 6, at 259. Tonga was motivated by health-related concerns and Barbados supported the resolution because of longstanding concerns about nuclear fallout. *Id.* at 261.

38. The resolution embodying the request passed in Committee B by a vote of 73-31-6. Fifty-four delegations were absent. *Summary Records*, *supra* note 6, at 268.

39. *Id.* at 260 (statement of Mr. Boyer).



competence of the World Health Organization, and my delegation is dismayed that many speakers would choose to disregard the advice of the Legal Counsel.<sup>40</sup>

Some minutes later, prior to the World Health Assembly vote on the advisory opinion question, the WHO Legal Counsel responded to a request for "an advisory opinion on the mandate of WHO with respect to nuclear weapons, and the referral of this question to the International Court of Justice."<sup>41</sup> The Legal Counsel provided a full exposition of his judgment that, as a matter of law, the World Health Assembly lacked the competence to make the request as formulated.<sup>42</sup> Among other things, he stated that:

The question of health and health-related environmental effects of nuclear weapons falls squarely within the mandate of WHO as a technical agency. The question of whether the use of nuclear weapons by a State would be contrary to the spirit and objective of WHO and, as such, a violation of the Constitution of WHO, is also within the mandate and competence of this World Health Assembly. It is not within the normal competence or mandate of WHO to deal with the lawfulness or illegality of the use of nuclear weapons. In consequence it is also not within the normal competence or mandate of WHO to refer the lawfulness or illegality question to the International Court of Justice. . . . I hope I have been clear. I consider it not the legal mandate of WHO to deal with the lawfulness issue or refer it to the International Court of Justice. That is my considered opinion. But it is for you, the delegates to the World Health Assembly, to make the ultimate and final judgement on the range and the competence of this World Health Assembly.<sup>43</sup>

The delegates ignored this legal advice. In recommending that the World Health Assembly confine its discussion to the WHO Constitution, the Legal Counsel's advice reflected the ICJ's language in the *Certain Expenses* advisory opinion.<sup>44</sup> It thus pointed the way for the Court to conclude that the WHO had overstepped its competence without directly broaching the difficult and potentially explosive question of U.S.-style judicial review.<sup>45</sup>

40. *Verbatim Records*, *supra* note 20, at 273.

41. *Id.* at 278 (statement of Dr. Piel, WHO Legal Counsel).

42. *Id.* In addition, the Legal Counsel noted:

The Health Assembly might consider declaring on the question of violation of the Constitution, for nobody on earth stands higher or in a better position to decide that question, and were I to refer that aspect of the question to the International Court of Justice I think that they would refer back to WHO and say how come the Health Assembly has not ruled on it? But the question of whether the use of nuclear weapons is illegal under laws and conventions other than the WHO Constitution, that is the business of the United Nations. This is why I suggested, in Committee B, that you might consider . . . it in violation of the WHO Constitution, but that you would then transmit this resolution to the Secretary-General of the United Nations . . . . In that case, WHO would have respected its technical mandate, and would have transferred the legal question to the United Nations to seek an advisory opinion from the International Court of Justice. Therefore, the ultimate fundamental issue is one of mandate and competence.

*Id.* The Legal Counsel had expressed the same view at the 45th World Health Assembly in 1992: "Although the health effects of *nuclear radiation* fell within the competence of WHO, the question of whether the use of nuclear weapons was legal or illegal did not so readily fit the constitutional functions of WHO under Article 2 of its Constitution . . . ." *Programme of Work*, *supra* note 35, at 4 (emphasis added).

43. *Verbatim Records*, *supra* note 20, at 278.

44. *Cf.* *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 168 (July 20) (holding that judicial review by ICJ is limited, and that each U.N. organ determines its own jurisdiction in first instance at least).

45. See generally David Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993); Thomas M. Franck, *The "Powers of Appreciation": Who is the Ultimate*

The Legal Counsel's approach is consistent with ICJ jurisprudence and circumspection in cases suggesting conflict among U.N. organs.<sup>46</sup> The Court reasonably could conclude that any answer it might give to the question would not affect the WHO or any of its activities. Furthermore, the Court might conclude that, as the Legal Counsel observed, the WHO was unqualified to ask for an advisory opinion with respect to the international law governing the use of force and the laws of war, bodies of law that arguably have nothing to do with the WHO's work.<sup>47</sup> By adopting such an approach, the Court would in no way surrender its judicial function to "say what the law is"<sup>48</sup> — a function necessarily implying the power to rule that an official act does not comply with the law. Rather, this approach would avoid a potential political controversy with the permanent members of the United Nations, all of which possess nuclear weapons. Such a controversy would not benefit the Court or the WHO, advance respect for international law, or subject the nuclear weapon to the rule of law.

One may reach the same conclusion with respect to the WHO's competence to make the request by examining the U.N. Charter's statement of purposes and its allocation of responsibilities among principal U.N. organs. The maintenance and restoration of international peace and security takes pride of place in the U.N. Charter.<sup>49</sup> The Charter assigns "primary responsibility" for discharging this obligation to the U.N. Security Council,<sup>50</sup> and the ICJ has found that this allocation is consistent with the General Assembly exercising a secondary role.<sup>51</sup> The U.N. bodies created by the Charter have the power and duty to deal with matters of war and peace. In contrast, U.N. specialized agencies have responsibilities with respect to the consequences of the outbreak of armed conflict, but they do not have police obligations.

As framed by the World Health Assembly, the request seeks an advisory opinion regarding the use of nuclear weapons measured against the laws of war and related subjects. Hitherto, as the New Zealand delegate to the 1993 World Health Assembly suggested, the WHO's technical mandate did not

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*Guardian of UN Legality?*, 86 AM. J. INT'L L. 519 (1992); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993); Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L.J. 1 (1993).

46. See, e.g., Case Concerning Question of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, 165 (Apr. 14) (Weeramantry, J., dissenting) (holding Court has no power of judicial review over Security Council); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 45 (June 21) (finding no power of judicial review over General Assembly and Security Council, but stating that Court will consider conformity of their resolutions with U.N. Charter although such conformity was not subject of request for advisory opinion); *Certain Expenses*, 1962 I.C.J. at 168. Of course, the WHO is not an organ of the United Nations.

47. But see, e.g., Leonard M. Marks & Howard H. Weller, *Is the Use of Nuclear Weapons Illegal?*, N.Y. L.J., July 11, 1994, at 1 (concluding that question falls within WHO competence and that Court should find use of nuclear weapons illegal in all circumstances).

48. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

49. See U.N. CHARTER art. 1(1) (discussing prevention and removal of threats to peace).

50. *Id.* art. 24(1).

51. See *Certain Expenses*, 1962 I.C.J. at 151.

contemplate directing such issues to the Court.<sup>52</sup> The Constitution of the WHO contains no suggestion that WHO competence extends to the use of nuclear or other weapons.<sup>53</sup> To read it as doing so would amount to bootstrapping on a grand scale: what human activity, including military activity, does not affect health?<sup>54</sup> Indeed, the WHO Director-General admitted that the question was beyond the WHO's competence when he wrote in 1993 that "the only approach to the treatment of the health effects of nuclear explosions is primary prevention of such explosions, that is, the prevention of atomic war."<sup>55</sup> Preventing atomic war is outside the competence of the WHO. In short, the intense feelings of a number of WHO Members and groups of individuals do not give the WHO all-encompassing jurisdiction with respect to issues of war and peace.

While the ICJ has yet to decline to give an advisory opinion, it has explained the bases for its competence to render those opinions.<sup>56</sup> In 1962, the Court elaborated on its position in the earlier *Peace Treaties* opinion<sup>57</sup> by suggesting that, absent "compelling reason," the Court will give an opinion if the General Assembly asks for one.<sup>58</sup> The WHO, a specialized body, can

52. *Summary Records*, *supra* note 6, at 269.

53. *See* Written Statement, *supra* note 16.

54. Several statements in the WHO Constitution, beyond the Organization's general interest in worldwide health, indicate that the WHO was competent to make the request. "The health of all peoples is fundamental to the attainment of peace and security . . ." WHO CONST. pmb.; "The objective of the World Health Organization . . . shall be the attainment by all peoples of the highest possible level of health." *Id.* art. 1. These provisions, however, do not show that WHO activities under the WHO Constitution include responsibility for maintaining international peace and security so much as state an opinion about the value of health. Therefore, the *lawfulness* of the use of nuclear weapons is not a legal question arising within the scope of the WHO's activities. *See Summary Records*, *supra* note 6, at 269. In Committee, the Australian delegate said that his delegation had abstained from voting on the resolution because the Health Assembly's delegation was not competent to refer the question of the legality of nuclear weapons to the International Court of Justice. He stated that the question was a political issue that did not fall into the arena of world health and it was therefore inappropriate for the Health Assembly to consider it. *Id.* The *Summary Records* report the New Zealand delegate's position:

In view of the Organization's technical mandate, her delegation had grave doubts about the appropriateness of the procedure proposed in the resolution. Issues such as the legality of nuclear weapons should be dealt with in other forums. Her delegation had therefore abstained in the vote.

*Id.* Sweden abstained for the reasons articulated by Australia and New Zealand. *Id.*

The World Health Assembly has repeatedly expressed concern about nuclear war's health effects. *See, e.g., The Role of Physicians and Other Health Workers in the Preservation and Promotion of Peace as the Most Significant Factor for the Attainment of Health for All*, WHA34.38 (May 22, 1981). The resolution noted

the growing concern of physicians and other health workers in many countries at the mounting danger of thermonuclear war as the most serious threat to the life and health of all populations and their desire to prevent thermonuclear disaster which is an indication of the increased awareness among physicians and other health workers of their moral, professional and social duties and responsibilities to safeguard life and to improve human health, and to apply every means and resources to attaining health for all.

*Id.*; *see also Effects of Nuclear War on Health and Health Services: Resolution of the 40th World Health Assembly*, WHA40.24 (May 15, 1987) (regarding Management Group's report on effects of nuclear war on health and health services).

55. *Health and Environmental Effects of Nuclear Weapons*, *supra* note 2, at 2.

56. SHIHATA, *supra* note 13, at 44-45.

57. *See supra* notes 9 and 12.

58. *See, e.g., Certain Expenses of the United Nations*, 1962 I.C.J. 151, 155 (July 20).

be distinguished from U.N. organs like the General Assembly for several reasons.

First, as the U.N.-WHO Agreement states, the WHO's authority to request advisory opinions is restricted to issues arising within its competence.<sup>59</sup> The ICJ exercises its own judgment as to whether the specialized agency in fact has acted within its authority. U.N. organs are constitutionally equal to the ICJ, and the ICJ does not explicitly exercise judicial review over their actions.<sup>60</sup>

Second, the international community has an interest in restricting the activities of specialized agencies. The General Assembly and the Security Council are institutions of general jurisdiction; duplicates create confusion and competition. Avoiding this confusion is more important than abiding by the General Assembly's 1947 recommendation that specialized agencies consult the ICJ on legal questions.<sup>61</sup>

In addition, the Court has occasionally declined to act for reasons of propriety.<sup>62</sup> While the use of nuclear weapons under international law arguably is a legal question, it also is political.<sup>63</sup> The international community's handling of nuclear weapons, the progressive development of a restricting and controlling body of treaty law, and political realities revealed in World Health Assembly debates<sup>64</sup> indicate that the ICJ will be stepping into a political mare's nest by rendering an opinion. In such circumstances, the ICJ cannot usefully or successfully assist the process of controlling nuclear weapons. In the eyes of a number of governments and experts, the Court recently has damaged its international reputation by its controversial disposition of cases. The *Nicaragua* case stands out in this connection, but it is not alone.<sup>65</sup> Rendering an advisory opinion that does not advance the cause

59. See *supra* text accompanying notes 23-25.

60. See *supra* note 46.

61. See ROSENNE, *supra* note 13, at 216, 459.

62. See POMERANCE, *supra* note 13, at 277-329; SHIHATA, *supra* note 13, at 233-38.

63. Admitting that a question is political is not the same as denying that it is also legal in character. For example, the ICJ denied that the interpretation of treaties had a political character because treaty interpretation was "an essentially judicial test." *Certain Expenses*, 1962 I.C.J. at 155.

64. See *supra* note 37 (summarizing statements by Mexican and Zambian delegates).

65. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). This decision found that the United States violated international law by engaging in military and paramilitary activities against Nicaragua in the 1980s. The United States withdrew from the case and refused to accept ICJ compulsory jurisdiction after the Court held that it had jurisdiction to decide the question. The case raised significant issues of debate and discussion, including whether the ICJ may have jurisdiction over a matter involving individual or collective self-defense and whether it correctly stated the law with respect to armed attack, non-intervention, and collective self-defense. For perspectives on how the *Nicaragua* case affected confidence in the Court, see CROSSROADS, *supra* note 10. See generally JOHN NORTON MOORE, *THE SECRET WAR IN CENTRAL AMERICA* (1987) (concluding that ICJ's judgment supported aggression and undermined international order); STEPHEN M. SCHWEBEL, *JUSTICE IN INTERNATIONAL LAW* 134-39 (1994) (arguing that ICJ misinterpreted facts of *Nicaragua* case); T. D. Gill, *Litigation Strategy in the Nicaraguan Case at the International Court*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY* 197, 224 (Yoram Dinstein & Mala Tabory eds., 1989) ("It may well turn out that . . . the Court proceedings will turn out to have had more impact upon the Court than upon the outcome of the dispute itself."); André Gros, *La cour internationale de justice 1946-1986: Les réflexions d'un juge*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY*, *supra*, at 288, 299 (noting that, in wake of *Nicaragua*, four of five Permanent Members of United Nations do not consider ICJ trustworthy institution); Keith Highet, *Evidence, the Court, and the Nicaragua Case*, 81 AM. J. INT'L L. 1 (1987) (examining court's past fact-finding approaches and significance of *Nicaragua* case to Court's evidence-gathering practices and to Court as institution); Louis

of international peace and security might raise further questions about the reliability of the Court at a time when states increasingly use it to adjudicate disputes.<sup>66</sup>

Even without these justifications, the Court reasonably can and should find that the request is improper. The wording of the request places a burden on the Court to reframe it so that it is answerable.<sup>67</sup> At present, the request treats all nuclear weapons alike, when in fact their destructive capacities vary.<sup>68</sup>

### III. THE LAW OF ARMED CONFLICT AND NUCLEAR WEAPONS

By holding that the WHO has exceeded its powers in requesting this advisory opinion, the Court could conclude the dispute. Arguments based on the mission of the WHO, the legal rules for determining competence, and the U.N. Charter's approach to war and peace issues support such a result. The Court nonetheless may decide to render an opinion. The international order accepts war in self-defense as legitimate. At the same time, war's violence, destructiveness, and waste are difficult to reconcile with international community values as stated in the Charter of the United Nations.<sup>69</sup> The Court must confront these tensions in grappling with the WHO request. It must examine the provisions and purposes of the laws of war, the international law regarding initiating or entering armed conflict, and the interplay between the two. In addition, the Court must reconcile existing norms with weapons whose environmental and humanitarian effects are difficult to confine.

The legal regulation of armed conflict reflects technological developments and the increased destructiveness of war they often generate. Such regulation arguably does not and cannot cope with weapons of mass destruction because they are incompatible with the concept of battle and therefore with the legal regulation of battle.<sup>70</sup> Accordingly, since the atomic bombings at Hiroshima and Nagasaki, the international community has adopted a cautious, step-by-step approach to control, limit, and perhaps eventually eradicate weapons of

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B. Sohn, *The International Court of Justice and the Scope of the Right of Self-Defense and the Duty of Non-Intervention*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY*, *supra*, at 869 (discussing Court's findings on use of force, self-defense, and non-intervention in *Nicaragua* case); *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L. L. 77-183 (1987) (16 comments on *Nicaragua* decision).

*Nicaragua* is not the only case to engender controversy. See W. Michael Reisman, *An International Farce: The Sad Case of the PLO Mission*, 14 YALE J. INT'L L. 412, 423-28 (1989) (arguing that ICJ advisory opinion on U.N. Headquarters Agreement is at odds with international law and ICJ jurisprudence).

66. Speech by Sir Robert Jennings, President of the International Court of Justice, to the UN General Assembly, 88 AM J. INT'L L. 421, 422 (1994). These last reasons why the Court should not render an advisory opinion also apply to the General Assembly request. See *supra* note 3.

67. Reframing the request is within the Court's discretion. See *supra* note 13.

68. See generally HERMAN KAHN, *ON THERMONUCLEAR WAR* 476-89 (2d ed. 1961).

69. These community values include preventing war, affirming fundamental human rights, advancing justice and respect for international law, promoting social progress and tolerance, maintaining peace and security, developing friendly relations, achieving international cooperation, and harmonizing actions of states. See, e.g., U.N. CHARTER *pmbl.*, art. 1.

70. As a result, moreover, the WHO's request is too broad; it does not distinguish among nuclear weapons by size, capability, destructive power, and collateral impact.

mass destruction, and has eschewed self-deluding, blanket declarations having the force of law.<sup>71</sup> The laws of war form an integral part of the context for this step-by-step approach to the challenge of nuclear weapons. The next Sections provide a brief historical survey of the laws of war and examine the complex relationship between the laws of war and the right to use force.

### A. *The Legal Regulation of Armed Conflict and Weapons*

The laws of war traditionally reflected doctrinal caution; they regulate the conduct of hostilities without explicitly questioning their lawfulness.<sup>72</sup> Customary laws of war developed over centuries of experience, and conventional law was built agreement by agreement beginning in the middle of the nineteenth century. The Permanent Court of International Justice characterized the general process of international law creation as consensual in the 1927 *Lotus* case:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.<sup>73</sup>

The way international law is made and what it regulates have changed significantly since the *Lotus* decision. As the U.N. Secretary General noted in 1992, sovereignty was never so absolute in practice as in theory.<sup>74</sup> Today, of course, the process of international legislation is complex and multidimensional, and the subjects of international law are diverse.<sup>75</sup>

Doctrinal caution nevertheless remains characteristic of much international law. The international state structure is much as it was prior to World War II, and, therefore, state consent remains an important source of international law. The United Nations is a political organization superimposed on a functioning international system. States have delegated powers to the United Nations but have not created a world government. The U.N. Charter,

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71. The Kellogg-Briand Pact outlawing war as an instrument of policy, however useful it may have seemed to the prosecutors at Nuremberg, is just such an example of misconceived lawmaking. See Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57; *International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946*, 41 AM. J. INT'L L. 172, 216-21 (1947) [hereinafter *International Military Tribunal*].

72. CARL H. BUILDER & MORLIE GRAUBARD, *THE INTERNATIONAL LAW OF ARMED CONFLICT: IMPLICATIONS FOR THE CONCEPT OF ASSURED DESTRUCTION* at v-vi (1982) (defining origins and objectives of laws of war); 2 L. OPPENHEIM, *INTERNATIONAL LAW* 226-27 (H. Lauterpacht ed., 7th ed. 1952) [hereinafter OPPENHEIM 7TH EDITION] (tracing history of laws of war).

73. The S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7); see also *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44-45 (Feb. 20) (affirming vitality of *Lotus* dicta on customary law with respect to claim that Convention had become customary law).

74. BOUTROS BOUTROS-GHALI, *AN AGENDA FOR PEACE: PREVENTIVE DIPLOMACY, PEACEMAKING AND PEACE-KEEPING* 9 (1992) (report of the Secretary General to the Security Council).

75. See generally *World Health Meeting*, *supra* note 17 (describing varied agenda of WHO general assembly meeting); MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 161-363 (1980) (discussing global constitutive process of authoritative decision); 1 OPPENHEIM'S *INTERNATIONAL LAW* 4-96 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM 9TH EDITION] (discussing foundation of international law).

for example, provides that the United Nations "is based on the principle of the sovereign equality of all its Members."<sup>76</sup> As recently as 1992, the U.N. Secretary General reported to the Security Council that respect for the sovereignty and integrity of the state is "crucial to any common international progress."<sup>77</sup>

Consistent with the structure of the international community, longstanding doctrine considers the use of particular weapons lawful unless "expressly prohibited by treaties"<sup>78</sup> or "condemned by custom."<sup>79</sup> This statement of the law acknowledges that states could use a new weapon to attain a lawful object. They need not refrain from developing the weapon because non-combatants might be killed or injured, or a high level of destruction might result.<sup>80</sup> States using such a weapon or otherwise enjoying the benefits of this principle, of course, would not necessarily deem such consequences to constitute unnecessary suffering.<sup>81</sup> Pursuant to this view, states can use

76. U.N. CHARTER art. 2(1). For an analysis of "sovereign equality" in the U.N. Charter, see HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 50-53 (1966).

77. BOUTROS-GHALI, *supra* note 74, at 9.

78. 2 OPPENHEIM 7TH EDITION, *supra* note 72, at 340; *see also* U.S. AIR FORCE, *INTERNATIONAL LAW — THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS* § 6-5 (AFP 110-31, Nov. 19, 1976) ("The use of explosive nuclear weapons, whether by air, sea or land forces, cannot be regarded as violative of existing international law in the absence of any international rule restricting their employment."). *But see* NAGENDRA SINGH, *NUCLEAR WEAPONS AND INTERNATIONAL LAW* 48, 135-36 (1959) (describing use of nuclear weapons as incompatible with laws of war, violating such prohibitions as formal ban on poison gas). With respect to poison gas use in World War I, for example, any other conclusion about the need for express prohibitions to make all uses of particular weapons unlawful would have given both the Central Powers and the Allies of World War I the status of law violators with no discernible consequence. *See, e.g.,* C.R.M.F. CRUTTWELL, *A HISTORY OF THE GREAT WAR: 1914-1918* at 153-54, 165-66 (2d ed. 1936). Discussing German and British use of poison gas, Cruttwell notes that

[t]he introduction of gas warfare was received with an indignation which, though fanned by the newspapers, was deep and abiding among soldiers. Lord Kitchener was moved from his usual restraint to a passion of anger. When, however, he wrote to [Sir John] French that it was 'contrary to the rules and usages of war,' his statement was too sweeping. It was certainly contrary to 'usage', but it was not explicitly condemned, as has often been stated, by the wording of the Hague Convention of 1899. The passage referred to forbids 'the use of projectiles the sole object of which is the diffusion of asphyxiating gases'. This prohibition may have been intended inferentially to condemn the emission of cloud-gas, but it certainly does not say so. The action may well be held to be contrary to the spirit, but a legal document must be interpreted according to the grammatical meaning of the text.

*Id.* at 153.

79. 2 OPPENHEIM 7TH EDITION, *supra* note 72, at 340. The 8th (Lauterpacht's) edition of Oppenheim's treatise defines "usage" as habit not engaging a sense of obligation or right and "custom" as habit engaging a sense of obligation or right. *See* 1 L. OPPENHEIM, *INTERNATIONAL LAW* 26 (H. Lauterpacht ed., 8th ed. 1955). The 9th edition adopts the same definitions. 1 OPPENHEIM 9TH EDITION, *supra* note 75, at 27; *see also* FALK, *supra* note 5, at 22 (noting that Nuremberg affirmed living character of international law, and that pre-existing, specific prohibitions are not sole precondition for finding law that was violated). The U.S. Navy Handbook for Commanders notes the difficulty of determining the content of customary legal rules "[i]n a period marked by rapid developments in technology, coupled with the broadening spectrum of warfare to encompass insurgencies and state-sponsored terrorism." W. Michael Reisman & Chris Antoniou, *Introduction to THE LAWS OF WAR* at xx (W. Michael Reisman & Chris Antoniou eds., 1994) (quoting handbook).

80. The U.S. instructions for its delegation to the 1907 Hague Conference argue that prohibitions against inventing new, more efficient weapons should not restrict the inventive genius of the American people. *INSTRUCTIONS TO THE AMERICAN DELEGATION TO THE HAGUE PEACE CONFERENCES AND THEIR OFFICIAL REPORTS* (James B. Scott, ed. 1916).

81. MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949* at 196-97 (1982) (discussing difficulty of defining "necessity" of particular weapons); Richard R. Baxter, *The Role of Law*

nuclear weapons consistently with the U.N. Charter unless an agreement specifically bans the use.<sup>82</sup>

### B. *The Laws of War and the Right to Use Force*

Whether military operations are lawfully conducted has proved inseparable from the more general question of the lawfulness of their purpose. The historical development of the laws of war increasingly shows concern with the latter issue. Thus, clerics, philosophers, historians, lawyers, and warriors have argued for millennia about the place of war in human affairs, the morality of armed conflict, and the ethics of killing for political purposes, however just the cause.<sup>83</sup> Translated from abstract debate to the combat arena, these concerns have resulted in international laws of war and the U.N. Charter regulations about the right to use force. They did so because war and the military instrument embrace the most extreme forms of human-generated violence.<sup>84</sup>

War has contributed to the growth of its own law. Experience with total war during the French Revolution and the reign of Napoleon gave impetus to a movement that over time fostered consensus on two related points. First, aggression is a crime.<sup>85</sup> Second, there should be a code protecting prisoners of war, mitigating the effects of war on non-combatants, and reducing the suffering of wounded, sick, and shipwrecked combatants.<sup>86</sup>

As expressed in the 1868 Declaration renouncing small explosive projectiles, the purpose of such a code was to alleviate "as much as possible

in *Modern War*, 47 PROC. AM. SOC'Y INT'L L. 90, 91-92 (1953) (arguing that technological prowess increases proportion of necessary to unnecessary suffering).

82. But see, e.g., Nicholas Grief, *The Legality of Nuclear Weapons*, in NUCLEAR WEAPONS AND INTERNATIONAL LAW 22 (Isatvan Pogany ed., 1987) (arguing that both use and deployment are illegal); Malcolm N. Shaw, *Nuclear Weapons and International Law*, in NUCLEAR WEAPONS AND INTERNATIONAL LAW, *supra*, at 1 (arguing for sharp restraints on legitimate uses).

83. See, e.g., GEOFFREY BEST, *HUMANITY IN WARFARE* (1980) (discussing history of international law of warfare); WILLIAM V. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 1-5 (1981) (describing historical roots of just war doctrine); Paul A. Rahe, *Justice, Necessity, and the Conduct of War in Thucydides*, Public Lecture Delivered at the Woodrow Wilson International Center for Scholars (Jan. 25, 1994) (analyzing Thucydides' appreciation for effect of piety and justice on wartime behavior); Paul A. Rahe, *Thucydides' Critique of Realpolitik* (1994) (on file with author and *The Yale Journal of International Law*).

84. See, e.g., 2 OPPENHEIM 7TH EDITION, *supra* note 72, at 204, 226 (describing brutality of war); J. Maxwell Cohen, *Introduction to LAWYERS AND THE NUCLEAR DEBATE* 1-2 (J. Maxwell Cohen & Margaret E. Gouin eds., 1988) (explaining Grotian vision of legal restraints on law's ferocity); Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L. REV. 49 (1994) (arguing laws of war used to legitimate increasing destructiveness of warfare); see also Eliot A. Cohen, *The Mystique of U.S. Air Power*, 73 FOREIGN AFF. 122, 122 (Jan.-Feb. 1994) ("The simple and brutal fact remains that force works by destroying and killing.").

85. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 18 (1963) (quoting William Pitt the Younger depicting France as unjust aggressor); GEOFFREY BRUUN, *EUROPE AND THE FRENCH IMPERIUM: 1799-1814* at 200-01 (1938) (describing work of Congress of Vienna); HAROLD NICOLSON, *THE CONGRESS OF VIENNA* 227 (1946) (noting that in 1815 eight countries declared Napoleon an outlaw because he was threat to peace); C.K. WEBSTER, *THE CONGRESS OF VIENNA: 1814-1815* at 136 (2d ed., 1934) (describing settlement of German and Polish questions); *International Military Tribunal*, *supra* note 71, at 219 (asserting illegality of aggressive war).

86. See *THE LAWS OF WAR*, *supra* note 79, at xvii-xxxi; Baxter, *supra* note 81, at 90.



the calamities of war."<sup>87</sup> States pursued this goal during the years before World War I by attempting to ban specific weapons — exploding bullets, expanding (dum-dum) bullets, and poison gas<sup>88</sup> — and embarking on a great effort to codify the laws of war. This work culminated in the 1907 Hague Conventions.<sup>89</sup>

The Hague Conventions reached wider and deeper in the effort to regulate the scope and impact of war than any previous multilateral agreement.<sup>90</sup> They began the connection between the laws of war and the law governing the right to use force that later agreements were to amplify.<sup>91</sup> In part a derivative of religious (particularly Christian) just war theories, the Hague Conventions prohibited unnecessary, inhumane, or unlimited battlefield violence.<sup>92</sup> Thus,

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87. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, pmbl., in DOCUMENTS ON THE LAWS OF WAR 30 (Adam Roberts & Richard Guelff eds., 2d ed. 1989). The Declaration included the oft-quoted homily "[t]hat the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy." *Id.* at 30-31. *But see* SIR WILLIAM ROBERTSON, FROM PRIVATE TO FIELD MARSHAL 351 (1924) (noting that modern warfare increasingly consigns old notion of making war only against armies and navies to background). For differing views of the legal character of the Declaration, compare DOCUMENTS ON THE LAWS OF WAR, *supra*, at 29-30 (stating Declaration regarded as expressing customary prohibition on causing unnecessary suffering) with William V. O'Brien, *Legitimate Military Necessity in Nuclear War*, 2 WORLD POLITY 35, 87-88 (1960) [hereinafter O'Brien, *Legitimate Military Necessity*] (noting Declaration "not recognized as clear-cut, positive international law") and Reisman & Antoniou, *supra* note 79, at 35 (stating Declaration is of historical, not practical, interest). With respect to the humanitarian purpose of the laws of war, particularly the 1949 Geneva Conventions, Hersch Lauterpacht has stated:

We shall utterly fail to understand the true character of the law of war unless we are to realize that its purpose is almost entirely humanitarian in the literal sense of the word, namely, to prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle and passion. This, and not the regulation and direction of hostilities, is its essential purpose. Rules of warfare are not primarily rules governing the technicalities and artifices of a game. They have evolved or have been expressly enacted for the protection of actual or potential victims of war.

Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 363-64 (1952).

88. These weapons already had been developed or used. *See generally* THE LAWS OF ARMED CONFLICTS 221-899 (Dietrich Schindler & Jifí Toman eds., 1988) (reproducing texts of conventions, draft conventions, and resolutions on law of armed conflict adopted or elaborated since codification movement started in 19th century); Howard S. Levie, *The Laws of War and Neutrality*, in NATIONAL SECURITY LAW 307-26 (John Norton Moore et al. eds., 1990) (excerpting treaties and other documents relating to such weaponry). For the relevant conventions themselves, see [Hague] Declaration (IV, 2) Concerning Asphyxiating Gases, July 29, 1899, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 36 (condemning use of "projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases"); [Hague] Declaration (IV, 3) Concerning Expanding Bullets, July 29, 1899, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 40; THE LAWS OF ARMED CONFLICTS, *supra*, at 103. The editors of both collections state that the dum-dum bullet violated the customary prohibition on weapons that inflict unnecessary harm. DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 39; THE LAWS OF ARMED CONFLICTS, *supra*, at 109.

89. THE LAWS OF ARMED CONFLICTS, *supra* note 88, at v.

90. *See id.*; Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 395 (1993); Levie, *supra* note 88, at 307-326.

91. *See generally* DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 2-16.

92. The codification movement began with Francis Lieber's General Orders No. 100, Instructions for the Government of Armies of the United States in the Field (April 24, 1863); *see also* WILLIAM V. O'BRIEN, LAW AND MORALITY IN ISRAEL'S WAR WITH THE PLO 91-95 (1991) (summarizing law governing conduct of war, *jus in bello*, and law governing decisions to engage in war, *jus ad bellum*); WILLIAM V. O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR (1981) (discussing law governing *jus in bello* and *jus ad bellum* and implications thereof); SINGH, *supra* note 78, at 17-20; Gardam, *supra* note 90, at 391-99.

they included comprehensive battlefield rules prohibiting such practices as using poison weapons, attacking undefended towns, and pillage.<sup>93</sup> Among other things, they also regulated naval warfare and defined the rights and duties of neutrals on land and at sea.<sup>94</sup> Additional regulations addressed the status and treatment of prisoners of war.<sup>95</sup>

Such codifications introduced a high degree of certainty regarding the content of the laws of war, especially when compared to the customary law,<sup>96</sup> but they did not alleviate the calamity of war.<sup>97</sup> Nonetheless, each successive war has given impetus to more and more lawmaking with respect to the conduct of military operations.<sup>98</sup> After World War I, states attempted to ban poison gas, "analogous liquids, materials or devices,"<sup>99</sup> and "bacteriological methods of warfare."<sup>100</sup> After World War II, the four Geneva Conventions strengthened protections for combatants, the wounded, prisoners, and non-combatants.<sup>101</sup> The Vietnam War generated Additional Protocols I and II to these Geneva Conventions<sup>102</sup> and a prohibition on using

93. [Hague] Convention (IV) Respecting the Laws and Customs of War on Land, Annex, arts. 23, 25, 28 in DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 52.

94. [Hague] Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907; Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, Oct. 18, 1907; Convention (VII) Relating to the Conversion of Merchant Ships into War-ships, Oct. 18, 1907; Convention (VIII) Relating to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907; Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907; Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right to Capture in Naval War, Oct. 18, 1907; and Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, in DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 63-119. Undoubtedly in reaction to the way the Russo-Japanese War commenced, one of the 1907 Hague Conventions provided regulations for the initiation of war. For the most part, nations obeyed these regulations in 1914. See Levie, *supra* note 88, at 315-17 (noting usefulness of this Convention despite lack of effect prior to World War II).

95. [Hague] Convention (IV) Respecting the Laws and Customs of War on Land, Annex, arts. 4-20, in DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 48-52.

96. See THE LAWS OF WAR, *supra* note 79, at xx (referring to *The Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*). Content and implementation, of course, are different.

97. See, e.g., CRUTTWELL, *supra* note 78, at 153 ("In fact there is little to choose in horror and pain between the injuries inflicted by modern war. The extent to which a human body can be mangled by the splinters of a bomb or shell, without being deprived of consciousness, must be seen to be believed.").

98. See Baxter, *supra* note 81, at 94.

99. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, reprinted in UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS 14 (1982) [hereinafter ARMS CONTROL AND DISARMAMENT AGREEMENTS].

100. *Id.*

101. Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362 (1955); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3219, T.I.A.S. 3363 (1955); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364 (1955); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365 (1955). The Geneva Conventions are reprinted in a number of places, including DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 171-337.

102. Protocols [I and II] Additional to the Geneva Conventions of August 12, 1949, Dec. 12, 1977, 1125 U.N.T.S. 3, reprinted in INTERNATIONAL COMMITTEE OF THE RED CROSS, PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1977); see also DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 389. The Protocols, especially Protocol I, have engendered controversy. Compare Douglas J. Feith, *International Responses*, in HYDRA OF CARNAGE: THE INTERNATIONAL LINKAGES OF

the environment as a weapon.<sup>103</sup> In 1992, the international community concluded and opened for adoption a convention prohibiting chemical weapons.<sup>104</sup>

Each of these treaties built on the 1907 Hague Conventions. The purpose remained, as it had been in 1907, to mitigate the "severity" of armed conflicts.<sup>105</sup> In addition, the 1907 Conventions codified the principle that a belligerent's right to hurt the enemy in war was limited; one could not, for example, "employ arms, projectiles, or material calculated to cause unnecessary suffering."<sup>106</sup> The Nuremberg Tribunal held that these provisions reflected universally binding customary law.<sup>107</sup> These words expressed policies derived from "the usages established among civilized peoples, . . . the laws of humanity, and the dictates of the public conscience."<sup>108</sup> Such language appears in international agreements governing battlefield and war-related conduct, but goes beyond regulation of particular weapons or behavior — the effort to alleviate "the calamities of war"<sup>109</sup> —

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TERRORISM AND OTHER LOW-INTENSITY OPERATIONS 265 (Uri Ra'anani et al. eds., 1986) (concluding that Western negotiating weakness left Protocol I open to abuse by tyrants and terrorists) and Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 170 (1985) (arguing against ratification of Protocol I because it "adds ambiguity and complexity to the laws of war" and "fails utterly to protect those individuals and groups that most need protection") with George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 2 (1991) (arguing Protocol I will not benefit terrorists and is in interests of United States), George H. Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol*, 26 VA. J. INT'L L. 693 (1986) (asserting that Protocol I serves progressive ends and U.S. interests), George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764 (1981) (identifying and analyzing some contributions of Protocol I to laws of war), and Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 686 (1994) (declaring that Protocol I serves United States' interests in "clear and universal rules of warfare" and has "a significant humanizing influence on warfare").

103. See Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, 1108 U.N.T.S. 151, *reprinted in ARMS CONTROL AND DISARMAMENT AGREEMENTS*, *supra* note 99, at 190. See generally Jane G. Dalton, *The Environmental Modification Convention: An Unassuming but Focused and Useful Convention*, 6 HUMANITÄRES VÖLKERRECHT: INFORMATIONSSCHRIFTEN 140 (1993) (supporting use of Environmental Modification Convention as means to limit use of environment as war weapon).

104. 3 DEP'T ST. DISPATCH 662 (1992) (reporting completion of Chemical Weapons Convention on August 7, 1992).

105. Preamble to [Hague] Convention (IV) Respecting the Laws and Customs of War on Land, in DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 45. Maxwell Cohen wrote that the goal was to limit war's "ferocity." Cohen, *supra* note 84, at 1.

106. Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, annex arts. 22, 23(e), in DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 52.

107. *International Military Tribunal*, 22 TRIALS OF THE MAJOR WAR CRIMINALS 411, 497 (1948), (Opinion and Judgment, Sept. 30, 1946) ("[T]he [1907 Hague (IV)] convention expressly stated that it was an attempt 'to revise the general laws and customs of war,' which it thus recognized to be then existing, but by 1939 these rules laid down in the convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war . . .").

108. [Hague] Convention (IV) pmb., in DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 45. This language is known as the "Martens Clause." See DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 4. Similar language appears in the four Geneva Conventions of 1949: Convention I, art. 63, para. 4; Convention II, art. 62, para. 4; Convention III, art. 142, para. 4; Convention IV, art. 158, para. 4. DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 192, 213, 270, 325. This language also appears in more recent conventions concerning armed conflict. See Protocol I, art. 35, paras. 1, 2, in DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 409.

109. DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 30.

and prohibits acts and weapons causing "gratuitous suffering."<sup>110</sup> It emphasizes the desirability<sup>111</sup> of using the least force possible to attain military objectives. By giving a humanitarian purpose to affairs that are inherently inhumane, this requirement provides a connection to the law governing the right to use force internationally. If this language does not challenge the lawfulness of war in all circumstances, it does provide a humanitarian obligation with respect to the conduct of war. That obligation limits the right to use force under international law even though tradition, at least since Hugo Grotius, has treated it as a distinct legal duty and part of a separate legal regime.<sup>112</sup>

The nature of war and contemporary weaponry have challenged limited readings of the laws of war. General language in the Hague Conventions<sup>113</sup> and Protocol I,<sup>114</sup> for example, encourages this development. Especially in an age of dynamic jurisprudence<sup>115</sup> and rapid technological change, the laws of war cannot escape the context in which wars occur and questions about the lawfulness of war itself. The international community is not so integrated that it respects law that has developed without some acceptable form of consent.<sup>116</sup> Where important interests are at stake, jurisprudential reserve is inevitable.

The U.N. Charter distinguishes between permissible and impermissible uses of force by states without prohibiting or approving particular instrumentalities of force.<sup>117</sup> In this respect the Charter adopted the view of the International Military Tribunal at Nuremberg, which said that "those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention [of 1907]."<sup>118</sup> This approach fits the Charter's constitutional role. Consistent

110. FALK, *supra* note 5, at 24.

111. See *infra* text accompanying notes 119-139.

112. See, e.g., DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 1.

113. See *infra* text accompanying notes 89-95.

114. See, e.g., DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 389. The first paragraph of the Preamble of Protocol I recalls, *in haec verba*, article 2, paragraph 4 of the U.N. Charter:

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

*Id.*

115. See, e.g., BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 465-552 (1993).

116. Cf. JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 153-56 (1959) (contrasting international and municipal systems using example of *non liquet* courts' declining to decide case on ground that rules for its determination are not available).

117. See U.N. CHARTER art. 2(4) (prohibiting threat or use of force); *id.* art. 51 (stating that nothing in U.N. Charter impairs inherent right of individual or collective self-defense if armed attack occurs). The Charter also does not address the conduct of military operations in its discussion of U.N. enforcement actions. *Id.* arts. 39-50.

118. *International Military Tribunal*, *supra* note 71, at 219 (noting that 1928 Pact of Paris, like Hague Conventions and other law, need not specify which violations are crimes or which tribunal should try them in order to create enforceable law). At its first session, the U.N. General Assembly affirmed the Nuremberg Charter. G.A. Res. 95(I), U.N. Doc. A/64 at 188 (1946). On the legal character of U.N. General Assembly resolutions, see generally Blaine Sloan, *General Assembly Resolutions Revisited (Forty Years Later)*, 58 BRIT. Y.B. INT'L L. 39 (1987).

with its constitutive function, the U.N. Charter affirms both the existing international structure of nominally independent, equal, sovereign states and the right of self-defense.

As recognized in customary law,<sup>119</sup> implementation of that right of self-defense is lawful only when it is compatible with the principles of necessity and proportionality.<sup>120</sup> However defined, the principle of proportionality affirms the desirability of being sparing in the amount of force used, something military writers have long espoused.<sup>121</sup> What does the legal principle mean in operational terms? Does it mean that combatants always should use the minimum force to achieve permissible objectives?<sup>122</sup> Is proportionality to be measured in terms of tactical, battlefield objectives?<sup>123</sup> Strategic and tactical objectives are inseparable, although it may be difficult to determine precisely what the balance should be.<sup>124</sup>

Insisting on minimum force in armed conflict in order to comply with the laws of war means that these laws potentially reach beyond battlefield conduct. They at least give some precision to the concepts of necessity and proportionality, which are requirements for the lawful use of force.<sup>125</sup>

119. U.N. CHARTER art. 51. Commentators on the law of self-defense disagree about whether article 51 affirms customary law or makes new law. See, e.g., MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232-44 (1961) (describing overarching concern of Article 51 as preserving regional security systems in content of Charter and maintaining inviolate traditional uses of self-defense); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634 (1984) ("It is . . . not implausible to interpret Article 51 as leaving unimpaired the right of self-defense as it existed prior to the Charter."); C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURTS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 451, 497-99 (1952) ("Article 51 as is well known was not inserted for the purpose of defining the individual right of self-defense but of clarifying the position in regard to collective understandings for mutual self-defense.") (citations omitted). But see, e.g., BROWNLIE, *supra* note 85, at 272-78; ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 232-36 (1986); Bernard V.A. Röling, *On the Prohibition of the Use of Force*, in LEGAL CHANGE 274 (A. Blackshield ed., 1983).

120. See, e.g., BROWNLIE, *supra* note 85, at 261-64 (discussing coercion proportionate to threat); MCDUGAL & FELICIANO, *supra* note 119, at 242 ("Proportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objective of self-defense."); Schachter, *supra* note 119, at 1637-38 (discussing coercion proportionate to necessity of self-defense).

121. See, e.g., SUN TZU, THE ART OF WAR 77 (Samuel B. Griffith ed., 1963) (stating, circa 500 B.C., that "to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill.").

122. See MCDUGAL & FELICIANO, *supra* note 119, at 35-36, 241-44. Analyzing objectives in this way seems more appropriate than continuing to discuss proportionality in terms of military objectives. But see, e.g., Gardam, *supra* note 90, at 391-94, 410-13. War is a political act. The use of the military instrument entails tactical decisions in the context of, and affecting the definition and attainability of, political objectives. See CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds., 1976) (1832) ("[W]ar is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means.").

123. See Gardam, *supra* note 90, at 406-10 (reading Protocol I as requiring case-by-case, not cumulative, analysis of military objectives and means of obtaining them); see also SINGH, *supra* note 78, at 132-36, 219-20.

124. O'Brien, *Legitimate Military Necessity*, *supra* note 87, at 48-63. See generally William V. O'Brien, *The Meaning of Military Necessity in International Law*, 1 WORLD POLITY 109, 138-49 (1957) [hereinafter O'Brien, *Military Necessity in International Law*]. The author states that "[p]roportionality of acts of war must, therefore, be determined upon the relation to the means employed and a legitimate military end." *Id.* at 148 (emphasis in original).

125. BOTHE ET AL., *supra* note 81, at 196 (noting "relational" concepts of proportionality and necessity, involvement of comparative judgments and balance between suffering caused and "military advantage reasonably expected").

Vague language such as the prohibition on unnecessary suffering,<sup>126</sup> vindicated as customary law by the Nuremberg Tribunal<sup>127</sup> and revalidated in later law of war conventions,<sup>128</sup> encourages such expansion and heightens the interplay between the laws of war and the law governing international uses of force.<sup>129</sup> Nuclear weapons add technological impetus to the effort to confront the phenomenon of war through battlefield law.

Modern weaponry's capacity for destructiveness extends the dimension of interaction. Weapons of mass destruction bring special political and moral questions to concerns about the lawfulness of armed conflict.<sup>130</sup> Could the use of nuclear weapons, however "clean," ever be considered a proportional response to anything but the use of comparable force? Could nuclear weapons be a proportional response to a major tank offensive or the use of chemical weapons? Such weapons intensify attention on whether to maintain the existing world structure of formally independent states enjoying "sovereign equality"<sup>131</sup> and on alternatives.<sup>132</sup>

The movement to develop and increase international regulation of the conduct of war increasingly implies that such regulation can be the instrument for abolishing war.<sup>133</sup> Given technological development, this increase in regulation may be inevitable. Commentators and governments historically have regarded the laws of armed conflict as distinct from the law governing the

126. Baxter, *supra* note 81, at 91.

127. See *supra* note 107.

128. See, e.g., Protocol I, art. 35, in DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 409.

129. 1 JEAN PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 11-12 (1952) ("The law constituted by the Geneva Conventions has one inherent weakness: it forms part of the laws of war. As war threatens the very existence of States, legal rules are in danger, when war becomes total, of being trampled under foot on the pretext that necessity knows no law."). With respect to this last point regarding necessity, see 2 OPPENHEIM 7TH EDITION, *supra* note 72, at 231-36 (criticizing *Kriegsraison*); ROBERT E. OSGOOD & ROBERT W. TUCKER, FORCE, ORDER, AND JUSTICE 253-90 (1967) (discussing necessity in statecraft); O'Brien, *Military Necessity in International Law*, *supra* note 124, at 112-31 (situating and criticizing theory of *Kriegsraison* or *raison de guerre*).

130. See generally JOHN FINNIS, NUCLEAR DETERRENCE, MORALITY AND REALISM (1987) (discussing intersection of morality and strategic and radical limitations of nuclear deterrence); GREGORY S. KAVKA, MORAL PARADOXES OF NUCLEAR DETERRENCE (1987) (examining conflict between unlimited right to national defense and absolute prohibition against threatening lives of innocent people).

131. See U.N. CHARTER art. 2(1).

132. MICHAEL MANDELBAUM, THE NUCLEAR REVOLUTION 220-29 (1981) (discussing various understandings of nuclear apocalypse); HANS J. MORGENTHAU, POLITICS AMONG NATIONS (5th ed., 1978) (declaring world state necessary for peace); see JONATHAN SCHELL, THE FATE OF THE EARTH (1982) (discussing origin and significance of world's failure to think about nuclear weapons); STONE, *supra* note 116, at 346 (stating that international politics preclude state-like international organization); LEON WIESELTIER, NUCLEAR WAR, NUCLEAR PEACE (1983) (warning against simplistic approaches to nuclear disarmament while emphasizing the importance of politics in disarmament); Bernard Brodie, *War in the Atomic Age*, in THE ABSOLUTE WEAPON: ATOMIC POWER AND WORLD ORDER 21 (Bernard Brodie ed., 1946) (noting that despite atomic bomb, war and obliteration not synonymous); see also BOUTROS-GHALI, *supra* note 74, at 9 ("The foundation-stone [of the work to achieve international security] . . . is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality."). On the destructiveness of nuclear weapons, see, e.g., Extracts from Reports, 1958-72, of United Nations Scientific Committee on the Effects of Atomic Radiation, *reprinted in* Request of Australia for the Indication of Interim Measures (Austl. v. Fr.), 1978 ICJ Pleadings (1 Nuclear Tests) 61-117 (May 9, 1973); KAHN, *supra* note 68.

133. STONE, *supra* note 116, at 342-48.

right to use force<sup>134</sup> although critiques of the view that military necessity knows no law implicitly acknowledged the connection and its importance.<sup>135</sup> These fields of law intersect because the international system permits war to occur and relies on the threat of war to maintain nuclear peace.<sup>136</sup>

In contemplating the WHO's request, the ICJ confronts the tension between the right to use force in certain circumstances and the rules that regulate and restrict this right. In subjecting decisions regarding the conduct of military operations to judicial review,<sup>137</sup> the international legal community affirmed that the right of self-defense, although inherent and unimpaired under the U.N. Charter,<sup>138</sup> is not unlimited. This fact raises a question about where to draw the line so that states are not compelled to choose between exercising their inherent right of self-defense and respecting international law. Environmental concerns bring this issue into focus.

### C. *The Environment and the Use of Force*

The laws of war developed to become an increasingly specific and far-reaching code. In part, technological developments in warfare and the barbarity of modern, total war drove the process. These realities extended the battlefield and generated legal protections of such subjects as the environment that traditionally were not part of the laws of war. In addition to augmenting the complexity of the laws of war, this development heightened the impact of such law on the international right of self-defense.

In principle, the laws of war reinforce the right of self-defense and the necessity and proportionality requirements for lawful uses of force. In some cases, the laws of war go beyond these rights by limiting states' military choices.<sup>139</sup> Limits that reflect the character of the international order and the

134. See, e.g., BUILDER & GRAUBARD, *supra* note 72, at vi ("The law of armed conflict does not consider the justifications for engaging in war; it applies only to the conduct of hostilities.").

135. See, e.g., BROWNIE, *supra* note 85, at 1-50; MCDUGAL & FELICIANO, *supra* note 119, at 1-11; Christopher Greenwood, *The Relationship Between jus ad bellum and jus in bello*, 9 REV. INT'L STUD. 221 (1983) [hereinafter Greenwood, *Relationship*] (stating that despite closeness, laws of war and international regulation are two logically independent branches of law); Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY, *supra* note 65, at 273 (expressing view that U.N. Charter recognizes necessity as whole justification for use of unilateral military force); O'Brien, *Military Necessity in International Law*, *supra* note 124, at 109.

136. On August 15, 1972, Senator J. William Fulbright, Chairman of the Senate Foreign Relations Committee, stated:

A very perspective [sic] writer said that we and the Russians had agreed to put our people and our cities as hostages to each other's nuclear capability. This, he wrote, would contribute more to a stable deterrence, a stable nuclear relationship between the two great powers than anything he could think of.

118 Cong. Rec. at 28,239 (1972).

137. See *International Military Tribunal*, *supra* note 71, at 216-21; Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 9-11 (1982).

138. U.N. CHARTER art. 51.

139. Sometimes respect for the law can produce unintended results. For example, heightened sensitivity to legal requirements in military decisions during the 1991 Persian Gulf War and fear of allegations that the law had been violated caused Coalition forces to refrain from destroying monuments to Saddam Hussein and his regime. Destroying them arguably would have advanced goals established by the U.N. Security Council for achievement through the use of "all necessary means." See S.C. Res. 678,

international legal system will be enforced through reciprocal respect, retaliation, and the threat of retaliation.<sup>140</sup> To the extent that they are at odds with the international structure, they will be in tension or outright conflict with the U.N. Charter.

Protocol I to the 1949 Geneva Conventions illuminates the tension between international law and the laws of war.<sup>141</sup> The Protocol reaffirms limitations codified in the Hague Conventions by prohibiting weapons and methods of warfare that cause superfluous injury or unnecessary suffering.<sup>142</sup> In addition, it bars any methods or means of warfare that "are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." Protocol I also provides that,

[a]mong others, the following types of attacks are to be considered as indiscriminate:

- (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
- (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>143</sup>

The environment has long been a casualty of war. For example, the battle of Verdun in World War I caused the disappearance of topsoil and vegetation for years.<sup>144</sup> Later wars were equally hard on the environment, and the negotiators of Protocol I recognized this fact. A working document from the conference that generated the Protocol notes that Protocol I's prohibition aimed at effects lasting "a significant period of time, perhaps for ten years or more. However, it is impossible to say with certainty what period of time might be involved and for this reason, no time is specified in the Article."<sup>145</sup> The language of Protocol I is unlimited in reach. This point was illuminated by attempts to find that Iraq's actions in the 1991 Persian Gulf War violated the Protocol's environmental protections in addition to longer-

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U.N. SCOR, 45th Sess., 2963d mtg., at 27, U.N. Doc. S/INF/46 (1990); ELIOT A. COHEN, GULF WAR AIR POWER SURVEY 240-47 (1993) (stating legal objections to bombing propaganda symbols as cultural monuments protected by international law).

140. THE LAWS OF WAR, *supra* note 79, at xvii-xviii.

141. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978), in DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 389-446.

142. See, e.g., [Hague] Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, art. 23, para. (e), in DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 52; Richard A. Falk, *The Environmental Law of War: An Introduction*, in ENVIRONMENTAL PROTECTION AND THE LAW OF WAR: A 'FIFTH GENEVA' CONVENTION ON THE PROTECTION OF THE ENVIRONMENT IN TIME OF ARMED CONFLICT 78, 83-84 (Glen Plant ed., 1992).

143. Protocol I, art. 51, para. 5, *supra* note 87, 87, at 416.

144. ALISTAIR HORNE, THE PRICE OF GLORY 327 (1963).

145. Report of the Chairman of the Group "Biotope," Committee III, 11 March 1975 (CDDH/III/GT/35), reprinted in 2 HOWARD S. LEVIE, PROTECTION OF WAR VICTIMS 267-68 (1980).



established law such as the Nuremberg Principles and the Fourth Geneva Convention.<sup>146</sup>

Environmental debates following the 1991 Persian Gulf War illustrate a logical consequence of framing a legal prohibition as Protocol I does. Environmental damage inflicted by Iraq generated interest in adding to existing law governing the wanton destruction of occupied territory.<sup>147</sup> In at least one case, the proposed reform would prohibit any military activity causing environmental damage.<sup>148</sup>

Creating such environmental war crimes risks impairing the right of individual and collective self-defense affirmed in the U.N. Charter.<sup>149</sup> States possessing technologically advanced weapons might be able to undertake environmentally "clean" operations. States without such weapons, however, might find it impossible to exercise their right of self-defense without violating environmental protection laws. If such a country were invaded, it could not legally exercise the right of self-defense. In the 1991 Persian Gulf War, Coalition forces equipped only with World War II gravity weapons might have had to destroy wide areas of Baghdad in an effort to hit a small but militarily significant target such as a communications room.<sup>150</sup> This destruction, which might be both longlasting and severe with respect to the environment, potentially could constitute a violation of the new laws of war. A victim of aggression therefore might have to submit to aggression rather than risk causing environmental damage with effective defense.<sup>151</sup> Such actions also might be proscribed as violations of Protocol I's prohibitions on indiscriminate destruction, thus emasculating these states' right of self-defense.<sup>152</sup>

#### IV. NUCLEAR WEAPONS AND WORLD PUBLIC ORDER

Inescapably buried in the WHO request is the role of nuclear weapons. Through good luck or good management or some combination thereof, the world to date has witnessed only two wartime detonations of these weapons. Legal instruments have codified international commitments to limit and control them. Respecting the customary law of the nuclear age, nuclear weapons states have acted with care and restraint when the risk of nuclear conflict

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146. See, e.g., THE LAWS OF WAR, *supra* note 79, at xxviii; JOHN NORTON MOORE, CRISIS IN THE GULF: ENFORCING THE RULE OF LAW 22-26, 52-66, 76-82 (1992). See generally LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD PUBLIC ORDER 954-89 (1994) (discussing environmental impact of Iraq's actions during Gulf War and how these actions violated established international law).

147. MOORE, *supra* note 146, at 76-82 (discussing environmental terrorism); Reisman & Antoniou, *Introduction to THE LAWS OF WAR*, *supra* note 79, at xxviii.

148. ENVIRONMENTAL PROTECTION AND THE LAW OF WAR, *supra* note 142, at 46-47.

149. U.N. CHARTER art. 51.

150. RICK ATKINSON, CRUSADE: THE UNTOLD STORY OF THE PERSIAN GULF WAR 34-36 (1993) (noting attacks by precision bombs with limited collateral damage).

151. See ENVIRONMENTAL PROTECTION AND THE LAW OF WAR, *supra* note 142, at 122-23 (quoting comments on prohibiting environmental warfare).

152. See BOTHE ET AL., *supra* note 81, at 309-10 (noting that article 51, subparagraph 5(b), prohibits indiscriminate attacks on civilians, while subparagraph 5(a) prohibits attacks not directed at specific military objectives). Bothe, Partsch, and Solf declare that such indiscriminate attacks are now illegal. However, the same commentators state that Protocol I does not apply to the use of nuclear weapons, *id.* at 191, although such weapons indiscriminately attack civilians.

appeared high. This phenomenon is part of a community policy dealing with nuclear weapons in a practical, step-by-step manner rather than in sweeping generalities. In addressing the WHO request for an advisory opinion, the ICJ must take this method of community policing into account.

Of the instrumentalities of violence, none so far developed surpasses the most powerful nuclear weapons in quantum and longevity of destructiveness per unit.<sup>153</sup> Nuclear weapons would cause damage orders of magnitude greater and more dangerous than that caused by entire war, as radiation leaks from nuclear plants at Three-Mile Island and Chernobyl emphasized. The use of nuclear weapons, therefore, endangers not just vegetation in a particular locality, but life on the planet.<sup>154</sup> Notwithstanding this fact, the United States,<sup>155</sup> Great Britain, and France made statements or attached reservations stating that Protocol I was not intended to affect, regulate, or prohibit the use of nuclear weapons.<sup>156</sup> In signing the document, these states nonetheless acknowledged that Protocol I would apply to, and might prohibit the use of, nuclear weapons.<sup>157</sup> The WHO, of course, requested an opinion regarding the lawfulness of nuclear weapons use in terms of environmental and health impact, issues central to Protocol I.

#### A. *The Use of Nuclear Weapons*

In the almost fifty years since the atomic bombings of Hiroshima and Nagasaki hastened the end of World War II, possessors of nuclear weapons have threatened to use them in order to obtain political results. During the Cold War, for example, the United States and its allies relied on nuclear weapons to deter aggression in Europe by threatening to use them in response to invasion or nuclear attack of Western Europe by the Soviet Union and its

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153. See generally KAHN, *supra* note 68; HERMAN KAHN, THINKING ABOUT THE UNTHINKABLE IN THE 1980s (1984).

154. See *supra* sources cited in note 132.

155. The United States has signed, but is not a party to, Protocol I. M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS (1984) 419; M.J. BOWMAN AND D.J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS: TENTH CUMULATIVE SUPPLEMENT (1993) 260-61.

156. BOTHE ET AL., *supra* note 81, at 189-90; DOCUMENTS ON THE LAWS OF WAR, *supra* note 87, at 467-68.

157. Bothe, Partsch, and Solf were members of delegations from their respective countries to the conference that negotiated Protocols I and II. They wrote:

Even if nuclear weapons are used in armed conflict, the Protocol in its entirety remains applicable to all aspects of the armed conflict governed by the Protocol except that the rules relevant to the use of weapons do not affect the use of nuclear weapons. Other provisions of the Protocol dealing with the wounded, sick and shipwrecked, prisoners of war and other victims of war remain applicable in any kind of armed conflict whatever weapons or methods of warfare are used. . . . The negotiating record thus shows a realization by the Conference that the scope of its work excluded the special problems of the use of nuclear weapons.

BOTHE ET AL., *supra* note 81, at 190-91. The authors also dispute the argument that the Protocol covers nuclear weapons because its language is unambiguous and thus obviates any recourse to the negotiating history for interpretative assistance under customary law, as codified in the 1969 Vienna Convention on the Law of Treaties. *Id.* at 191 n.12. The Indian delegation argued that Protocol I barred the use of nuclear weapons. *Id.* at 189, 192. Nongovernmental proponents of the request for an ICJ advisory opinion shared the Indian view. See GRIEF, *supra* note 2; Richard Falk, *Environmental Disruption by Military Means and International Law*, in ENVIRONMENTAL WARFARE: A TECHNICAL, LEGAL, AND POLICY APPRAISAL 33, 39-40 (A. Westing ed., 1984).

allies.<sup>158</sup> The United States implied a willingness to use nuclear weapons to end the Korean War and thereby accelerated the conclusion of the armistice negotiations.<sup>159</sup> The United States used similar threats in connection with other Cold War crises. The Soviet Union also appears to have threatened the use of nuclear weapons, notably in connection with various Middle East crises since 1956.<sup>160</sup>

This state of affairs was dangerous. Then-Secretary of State Kissinger described the challenge of U.S.-Soviet nuclear relations in the wake of the 1973 Arab-Israeli war as follows:

We [the United States and the Soviet Union] possess — each of us — nuclear arsenals capable of annihilating humanity. We — both of us — have a special duty to see to it that confrontations are kept within bounds that do not threaten civilized life. Both of us, sooner or later, will have to come to realize that the issues that divide the world today, and foreseeable issues, do not justify the unparalleled catastrophe that a nuclear war would represent. . . .<sup>161</sup>

As Kissinger implied, any use of nuclear weapons risked nuclear war, and nuclear war risked destroying the system of international affairs the law is intended to regulate. The rationality espoused by Secretary Kissinger has prevailed so far, but it may not always do so. Countries with substantial, current records of aggression have attempted to obtain nuclear and other weapons of mass destruction, and these countries could endanger the nuclear peace.<sup>162</sup>

## B. *Nuclear Weapons and International Law*

The fear of nuclear aggression permeates the advisory opinion request. One could conclude that nuclear weapons violate existing prohibitions on poison gas,<sup>163</sup> indiscriminate aerial bombardment,<sup>164</sup> or other provisions

158. See, e.g., HAROLD BROWN, *THINKING ABOUT NATIONAL SECURITY: DEFENSE AND FOREIGN POLICY IN A DANGEROUS WORLD* 49-112 (1983) (describing deterrence and protection of U.S. and European interests); MCGEORGE BUNDY, *DANGER AND SURVIVAL: CHOICES ABOUT THE BOMB IN THE FIRST FIFTY YEARS* 248 (1988) (depicting Eisenhower's determination to meet Soviet invasion of Western Europe with nuclear weapons).

159. BUNDY, *supra* note 158, at 240-44.

160. See, e.g., HENRY KISSINGER, *YEARS OF UPHEAVAL* 576-99 (1982) (implicitly noting nuclear crisis during Yom Kippur War); HOWARD M. SACHAR, *A HISTORY OF ISRAEL* 505, 771 (describing Soviet threats during 1956 Suez crisis and Yom Kippur War, respectively). Cf. BUNDY, *supra* note 158, at 518-25 (rejecting view that Yom Kippur War involved nuclear threats by Soviets).

161. KISSINGER, *supra* note 160, at 594 (opening statement at press conference, Oct. 25, 1973).

162. For analyses expressing greater confidence that proliferation will not undermine stability, see PIERRE GALLOIS, *STRATÉGIE DE L'ÂGE NUCLÉAIRE* (1960); F.C. IKLÉ, 'NTH COUNTRIES' AND DISARMAMENT (1960); KENNETH WALTZ, *THE SPREAD OF NUCLEAR WEAPONS: MORE MAY BE BETTER* (1981).

163. SINGH, *supra* note 78.

164. J.M. SPAIGHT, *AIR POWER AND WAR RIGHTS* 277 (3d ed. 1947). see also MCDUGAL & FELICIANO, *supra* note 119, at 6-68:

[E]ffective control of and protection from nuclear weapons can be hopefully sought, not in scholarly extrapolations and derivations from past analogies, nor even in a new and unequivocal agreement outlawing these weapons, but rather in the achievement of a consensus of the kind considered earlier, in the context of a comprehensive and continuing sanctioning process, that sustains the principle of minimum order itself as well as a prohibition of nuclear weapons.

of the laws of war. One might conclude that their use is disproportionate per se as Kissinger suggested. Kissinger also went on to note that "there are limits beyond which we cannot go . . . [W]e will oppose the attempt by any country to achieve a position of predominance, either globally or regionally."<sup>165</sup> He implied that nuclear weapons not only had a role to play as a deterrent against such attempts, but also might have a role to play as an instrument of war.

The nuclear weapon has been inextricably connected with international order since 1945. This fact reflects more than the coincidence that the U.N. Charter was ratified on August 8, 1945, two days after the bombing at Hiroshima and one day before the bombing of Nagasaki. From the inception of the nuclear age, governments and citizens believed that nuclear weapons necessitate a strong system of world public order.<sup>166</sup> In 1946, Bernard Baruch summarized this belief for the U.N. Atomic Energy Commission:

We are here to make a choice between the quick and the dead. That is our business. Behind the black portent of the new atomic age lies a hope which, seized upon with faith, can work our salvation. If we fail, then we have damned every man to be the slave of Fear. Let us not deceive ourselves: We must elect World Peace or World Destruction.<sup>167</sup>

In the United States, President Truman assumed that the new weapon was legal and recognized that technology had again jumped ahead of the law:

I realize the tragic significance of the atomic bomb. . . . Its production and its use were not lightly undertaken by this Government. But we knew that our enemies were on the search for it. We know now how close they were to finding it. And we knew the disaster which would come to this Nation, and to all peace-loving nations, to all civilization, if they had found it first. . . . The atomic bomb is too dangerous to be loose in a lawless world. That is why Great Britain, Canada, and the United States, who have the secret of its production, do not intend to reveal that secret until means have been found to control the bomb so as to protect ourselves and the rest of the world from the danger of total destruction. . . . We must constitute ourselves trustees of this new force — to prevent its misuse, and to turn it into the channels of service to mankind. . . . It is an awful responsibility which has come to us.<sup>168</sup>

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165. KISSINGER, *supra* note 160, at 594 (statement at press conference, Oct. 25, 1973).

166. See *supra* note 132. See generally SOLLY ZUCKERMAN, *NUCLEAR ILLUSION AND REALITY* (1982) (arguing that nuclear weapons cannot prevent war).

167. Bernard M. Baruch, Speech to the U.N. Atomic Energy Commission (June 14, 1946), in U.S. DEP'T OF STATE, *THE INTERNATIONAL CONTROL OF ATOMIC ENERGY: GROWTH OF A POLICY* 138 (1946) [hereinafter *GROWTH OF A POLICY*] (speech to U.N. Atomic Energy Commission setting forth outline of "Baruch Plan"); see also DAVID MCCULLOUGH, *TRUMAN* 650 (1992) (On July 21, 1948, President Truman said, "You [David Lilienthal] have got to understand that this isn't a military weapon. It is used to wipe out women and children and unarmed people, and not for military uses. So we have got to treat this differently from rifles and cannon and ordinary things like that."); HENRY L. STIMSON & MCGEORGE BUNDY, *ON ACTIVE SERVICE IN PEACE AND WAR* 635-36 (1947) (quoting memorandum by Stimson discussed with President, Apr. 25, 1945: "The world in its present state of moral advancement compared with its technical development would be eventually at the mercy of such a weapon. In other words, modern civilization might be completely destroyed.").

168. President Truman, Radio Report to the Nation on the Potsdam Conference (August 9, 1945), in 1945 PUB. PAP.: HARRY S. TRUMAN 203, 212-13 (1961).

In this statement, President Truman acknowledged tension among the right of self-defense, the right to achieve quickly and at minimum cost permissible ends of war, and the requirements of proportionality.<sup>169</sup>

Yet President Truman did not admit that atomic bombs violated any law.<sup>170</sup> Nor did the U.S.-U.K.-Canada Agreed Declaration of November 15, 1945, the first post-War multilateral policy statement on atomic weapons. This Declaration stated that the purpose of American, British, and Canadian atomic policy is "to attain the most effective means of entirely eliminating the use of atomic energy for destructive purposes and promote its widest use for industrial and humanitarian purposes."<sup>171</sup> This language, like Truman's, does not suggest recognition of legal prohibitions on the new weapon at the inception of the nuclear age.

The first systematic study of the policy implications of atomic energy revealed even more about the state of the law. The State Department Board of Consultants' Report of March 17, 1946 (the Acheson-Lilienthal Report), observed that

[w]hen the news of the atomic bomb first came to the world there was an immediate reaction that a weapon of such devastating force must somehow be eliminated from warfare; or to use the common expression, that it must be 'outlawed'. That efforts to give specific content to a system of security have generally proceeded from this initial assumption is natural enough. But the reasoning runs immediately into this fact: The development of atomic energy for peaceful purposes and the development of atomic energy for bombs are in much of their course interchangeable and interdependent. From this it follows that although nations may agree not to use in bombs the atomic energy developed within their borders, the only assurance that a conversion to destructive purposes would not be made would be the pledged word and the good faith of the nation itself. This fact puts an enormous pressure upon national good faith. Indeed, it creates suspicion on the part of other nations that their neighbors' pledged word will not be kept. . . . [W]ithout international enforcement no system of security holds any real hope at all.<sup>172</sup>

At the same time, anxiety about the spread and use of nuclear weapons has provided a leitmotiv of international politics since 1945. Outlawing the atomic bomb seemed impractical.<sup>173</sup> Accordingly, the Acheson-Lilienthal Report recommended creating an international organization with worldwide

169. *Id.*; see also MCDUGAL & FELICIANO, *supra* note 119, at 242-43 (placing proportionality in context of self-defense: "[T]he objective is to cause the initiating participant to diminish its coercion to the more tolerable levels of 'ordinary coercion.'").

170. See Truman, *supra* note 168.

171. Agreed Declaration on Atomic Energy [U.S., U.K., Canada], Nov. 15, 1945, *reprinted in* GROWTH OF A POLICY, *supra* note 167, at 119. In addition, the Agreed Declaration stated that "there can be no adequate military defense [against nuclear weapons]" and no monopoly, assumptions that became touchstones of the nuclear era. *Id.* at 118.

172. U.S. Dep't of State, Board of Consultants for the Secretary of State's Committee on Atomic Energy, *A Report on the International Control of Atomic Energy*, March 16, 1946, at 20-21 (1946) [hereinafter Acheson-Lilienthal Report]. For a sample of contemporary opinion about the atomic bomb, see RAYMOND ARON, *ON WAR* (Terence Kilmartin trans., 1968) (discussing atomic weapons and diplomacy). The Japanese Government had protested to the United States on August 10, 1945 that atomic bombing was inhumane and inconsistent with the laws of war. JOSEPH I. LIEBERMAN, *THE SCORPION AND THE TARANTULA: THE STRUGGLE TO CONTROL ATOMIC WEAPONS, 1945-1949*, at 128-37 (1970) (describing use of atomic bomb at Hiroshima); see *Shimoda v. The State (Japanese Government)*, 8 JAPAN-ANN. INT'L L. 212, 252 (1964).

173. Acheson-Lilienthal Report, *supra* note 172, at 20-21 (suggesting that processes for peaceful and dangerous uses of atomic energy are too similar to make outlawing atomic energy realistic).

monopoly control of atomic-bomb-making capabilities: "The proposal contemplates an international agency conducting all intrinsically dangerous operations in the nuclear field, with individual nations and their citizens free to conduct, under license and a minimum of inspection, all non-dangerous, or safe, operations."<sup>174</sup> This idea was central to the Baruch Plan, which the United States proposed in 1946 as a way of reducing the nuclear danger through international control, licensing, and inspections.<sup>175</sup>

Even the proposal for international monopolization of dangerous atomic energy refrained from asserting the illegality of nuclear weapons use. Moreover, the Soviet Union's proposal regarding the nuclear threat to international peace took the form of a treaty outlawing the production and use of atomic weapons.<sup>176</sup> At the third meeting of the U.N. Atomic Energy Commission on July 26, 1946, the Dutch representative argued that prohibitions on nuclear weapons would be futile. He cited prior unsuccessful efforts to ban particular weapons as evidence of both the impracticality and inefficacy of such prohibitions in the past.<sup>177</sup>

In 1945 governments assumed new law would be needed to render nuclear weapons use unlawful. Either this view was incorrect, or some intervening development in the law has rendered the use of such weapons unlawful today. The *Shimoda* decision of 1963 represents one judicial effort to place the atomic bombings of Hiroshima and Nagasaki in the context of the international laws of war and to rule on their legality.<sup>178</sup> Deciding the damage claims of five plaintiffs arising from the atomic bombings, the Tokyo District Court concluded that these bombings violated the laws of war. No remedy was available because Japan had waived claims as part of the surrender in 1945.<sup>179</sup> The court noted that no treaty specifically addressed atomic weapons. It nonetheless found that their use in World War II violated general

174. *Id.* at 31.

175. Baruch, *supra* note 167, at 141.

176. Speech by Andrei Gromyko (June 19, 1946), in *GROWTH OF A POLICY*, *supra* note 167, at 209-16; see also JOSEPH L. NOGEE, *SOVIET POLICY TOWARDS INTERNATIONAL CONTROL OF ATOMIC ENERGY* 36-39 (1961) (stating that Soviet policy is founded on peaceful development of atomic energy, prohibition of atomic weapons, international control, and retention of full sovereignty); LENEICE N. WU, *THE BARUCH PLAN: U.S. DIPLOMACY ENTERS THE NUCLEAR AGE* 17-18 (1972) (describing Soviet proposal to United Nations Atomic Energy Commission).

177. *GROWTH OF A POLICY*, *supra* note 167, at 222-24 (quoting Dr. E. N. van Kleffens).

178. This decision did not rule on the general use of nuclear weapons. See Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki*, 59 AM. J. INT'L L. 759, 781 (1965) (describing discussion of *Shimoda*'s reference to evoking international law of nuclear war as "premature").

179. *Shimoda*, *supra* note 172. The history of the war is ignored in this judgment, which coincidentally was issued on the anniversary of the attack on Pearl Harbor. Falk's analysis also ignores the history of the war. See Falk, *supra* note 178. See generally Jordan J. Paust, *The Nuclear Decision in World War II — Truman's Ending and Avoidance of War*, 8 INT'L LAW 160 (1974) (analyzing decision to drop nuclear bombs on Hiroshima and Nagasaki). In comparison, President Truman's Speech of August 9, 1945 reflected the anger and fears of the time in language of vengeance, self-defense, and proportionality:

Having found the bomb we have used it. We have used it against those who attacked us without warning at Pearl Harbor, against those who have starved and beaten and executed American prisoners of war, against those who have abandoned all pretense of obeying international laws of warfare. We have used it in order to shorten the agony of war, in order to save the lives of thousands and thousands of young Americans.

Truman, *supra* note 168, at 212.

general principles of international law by virtue of their indiscriminate destructiveness, the undefended character of Hiroshima and Nagasaki, and the indiscriminate nature of the damage wrought by the bombs, even with the broadest definitions of military targets.<sup>180</sup> Such "really cruel"<sup>181</sup> weapons therefore violated legal norms despite the fact that, as the defendant acknowledged, their use hastened Japan's surrender and thus probably avoided casualties on both sides.<sup>182</sup> The decision failed to address why atomic bombs were more cruel or more indiscriminate than conventional bombs dropped by the thousands on equally ill defended cities, nor did it address the legal relevance of the origins or Axis conduct of World War II.

The ICJ has not yet ventured to address directly the issues tackled in *Shimoda*. In the *Nuclear Tests Case*, the court made important pronouncements on international law without reaching the merits of the lawfulness of atmospheric nuclear testing in terms of environmental and health effects.<sup>183</sup> It nonetheless did influence the policy of a permanent member of the United Nations who possessed nuclear weapons,<sup>184</sup> thereby demonstrating its ability to shape the law even while abstaining from a decision on the merits.

Nevertheless, much international law depends on the expectations and practices of states. Thus, notwithstanding modern evidence, one cannot conclude that nuclear weapons were unlawful in the circumstances of World War II.<sup>185</sup> In the years following failure of the Baruch Plan initiative, states concluded treaties to limit quantities and types of especially destructive weapons or to ban them altogether. Nuclear arms control agreements, including the 1968 Non-Proliferation Treaty,<sup>186</sup> presume that possession of nuclear weapons does not violate international law. Legal possession implies lawful uses. At the same time, most such treaties emphasize and reemphasize the devastating consequences of nuclear war.<sup>187</sup> They therefore reinforce the

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180. *Shimoda*, *supra* note 172, at 239.

181. *Id.* at 234.

182. *Id.* at 226.

183. See *Nuclear Tests Case*, 1974 I.C.J. 252; Thomas M. Franck, *Word Made Law: The Decision of the ICJ in the Nuclear Tests Cases*, 69 AM. J. INT'L L. 612 (1975) (noting binding quality of unilateral French declaration).

184. John B. Rhinelander, *Arms Control in the Nuclear Age*, in NATIONAL SECURITY LAW, *supra* note 88, at 573 (noting that France stopped atmospheric testing in 1974); Daniel Southerland, *Sino-Soviet Trade Talks End; China's Three Conditions for Better Relations Unaddressed*, WASH. POST, March 22, 1986, at A21 (stating that China's last officially announced atmospheric nuclear test occurred in October 1980).

185. Cf. *Nuclear Tests*, 1974 I.C.J. at 368 (Onyeama, Dillard, Jiménez de Arechaga, Waldock, JJ., dissenting) (stating that evidence of State practice as whole would be basis for determination of existence or non-existence of customary law).

186. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT], *reprinted in* ARMS CONTROL AND DISARMAMENT AGREEMENTS, *supra* note 99, at 91.

187. See, e.g., Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435, pmbl., in ARMS CONTROL AND DISARMAMENT AGREEMENTS, *supra* note 99, at 157 (stating that treaty proceeds "from the premise that nuclear war would have devastating consequences for all mankind"); Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War, Sept. 30, 1971, U.S.-U.S.S.R., 22 U.S.T. 1590 pmbl., in ARMS CONTROL AND DISARMAMENT AGREEMENTS, *supra* note 99, at 120 (making reference to "the devastating consequences that nuclear war would have for all mankind"); NPT, *supra* note 186, at 484 (referring to "the devastation that would be

idea that international peace and security depend on reducing the risk of nuclear war.<sup>188</sup>

The preamble of the Non-Proliferation Treaty emphasizes the connection between state pledges to work toward nuclear disarmament and agreements by nonnuclear states not to obtain nuclear weapons.<sup>189</sup> In order for nonnuclear weapons states to continue to accept nuclear nonproliferation, the states with nuclear weapons must ensure the security of such nonnuclear weapons states and, possibly, move toward eliminating their own nuclear weapons.<sup>190</sup>

Existing treaties for the control of nuclear weapons and the ongoing negotiation of others constitute evidence that the international community does not believe that existing law, apart from customary and U.N. Charter rules regulating the right of self-defense, prohibits the existence or use of nuclear weapons.<sup>191</sup> This view has been consistent with state behavior since the earliest efforts to regulate military operations formally by codified law. Each time a new, horrific weapon was developed, consensus grew to regulate or outlaw it and led to the conclusion of a treaty to accomplish that purpose.<sup>192</sup>

Most authorities in 1945 agreed, therefore, that existing law did not outlaw the use of nuclear weapons.<sup>193</sup> Nuclear deterrence was effective only

visited upon all mankind by a nuclear war . . .").

188. See *supra* text accompanying notes 166-176.

189. NPT, *supra* note 186, pmbl. The preamble further expressed the desire to ease international tensions and reaffirmed U.N. Charter article 2(4) *in haec verba. Id.*

190. See U.N. SCOR, 23d Sess., 1430th mtg. at 4-5, U.N. Doc. S/PV.1430 (1968) (statements by Ambassador Goldberg) (discussing U.K.-U.S.-U.S.S.R. joint pledge to seek immediate, effective U.N. Security Council action to counter nuclear aggression or threat of aggression against nonnuclear weapons state).

191. See *Summary Records*, *supra* note 6, at 275 (speech by Vanuatu delegate, sponsor of resolution embodying WHO request for an advisory opinion, noting U.K. position that NPT recognized legitimacy of possession of nuclear weapons by nuclear weapon states).

192. The International Committee of the Red Cross has explained its reluctance to include such specific weapon restrictions in the Draft Protocol and why it limited its draft proposal to general principles: (1) The question of arms and their prohibitions is dealt with by other organizations including the United Nations. (2) The prohibition of specific weapons had always been the subject of legal instruments separate from the Geneva Conventions — a separation that was also explained by the fact that rules of the Conventions are of an absolute nature (i.e., unilateral obligations) whereas the prohibition of weapons is subject to reciprocity. Accordingly, it prefers to limit the use of weapons indirectly by imposing a greater respect for certain categories of persons or objects. See BOTHE ET AL., *supra* note 81, at 197; see also BUILDER & GRAUBARD, *supra* note 72, at ix (arguing that concept of assured destruction is unlawful under laws of armed conflict); Falk, *supra* note 178, at 759 (displaying skepticism about capacity of international law to regulate war); GEORG SCHWARZENBERGER, *THE LEGALITY OF NUCLEAR WEAPONS* (1958) (arguing that nuclear weapons are inconsistent with 1899 Hague Declaration on Asphyxiating Gases and 1925 Geneva Protocol); SINGH, *supra* note 78 (discussing illegality of nuclear weapons in terms of laws of armed conflict and rights of neutrals); David M. Corwin, *The Legality of Nuclear Arms Under International Law*, 5 DICK. J. INT'L L. 271 (1987) (stating that almost all uses of nuclear weapons are illegal); Matthew Lippman, *Nuclear Weapons and International Law: Towards a Declaration on the Prevention and Punishment of the Crime of Nuclear Humanicide*, 8 LOY. L.A. INT'L & COMP. L.J. 183 (1986) (arguing that use of nuclear weapons is illegal and should be formally recognized as such); Elliott L. Meyrowitz, *The Law of War and Nuclear Weapons*, 9 BROOK. J. INT'L L. 227 (1983) (arguing that all threats or uses of nuclear weapons are inconsistent with international law); Burns H. Weston, *Nuclear Weapons and International Law: Illegality in Context*, 13 DENV. J. INT'L L. & POL'Y 1 (1983) (stating use of nuclear weapons is illegal under humanitarian rules of armed conflict). See generally NUCLEAR WEAPONS AND INTERNATIONAL LAW (Istvan Pogany ed., 1987) (discussing illegality of nuclear weapons in variety of contexts).

193. The U.N. General Assembly advisory opinion request puts nuclear deterrence at risk by asking whether the threat to use nuclear weapons violates international law. Some nongovernmental organizations



because states feared retaliation. As Secretary of State John Foster Dulles remarked in 1953, with respect to nuclear weapons, the U.N. Charter was "preatomic age,"

obsolete before it actually came into force. As one who was at San Francisco, I can say with confidence that if the delegates there had known that the mysterious and immeasurable power of the atom would be available as a means of mass destruction, the provisions of the Charter dealing with disarmament and the regulation of armaments would have been far more emphatic and realistic.<sup>194</sup>

The Charter could not have been easily strengthened in 1945 without moving significantly in the unrealistic direction of world government. In any event, the task is to harness nuclear weapons within the law.

Whether or not the laws of war already prohibit the use of nuclear weapons, any military use of nuclear weapons should conform to the law governing the use of force. Respect for requirements of necessity and proportionality is integral to this body of law.<sup>195</sup> As an abstract proposition, existing law permits the use of nuclear weapons only in the narrowest of circumstances. Those circumstances include instances where the annihilation of a state and its people would be the alternative.<sup>196</sup> They also arguably encompass use against invasion, as the western allies contemplated during the Cold War. The law of proportionality and necessity would apply to any use<sup>197</sup> because the peril of using nuclear weapons, to user and victim alike, makes them virtually unusable to achieve lesser military objectives than survival.<sup>198</sup> Destruction and environmental damage, moreover, would have to be limited to what is required to resolve the situation giving rise to the right of self-defense.

This legal conclusion provides little comfort. It means that possession and limited use of nuclear weapons is lawful unless in contravention of the Non-Proliferation Treaty or inconsistent with an international agreement.<sup>199</sup> This

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intended this result. *See supra* note 7.

194. John Foster Dulles, *The Challenge of Our Time: Peace with Justice* (August 1953), in 39 A.B.A. J. 1063, 1066 (1953) (speech before the American Bar Association). Dulles also attended the Paris Peace Conference, where he was an originator of the war guilt clause in the Versailles Treaty. *See* FERDINAND CZERNIN, *VERSAILLES 1919*, at 278-96 (1964); *see also* John B. Rhinelander, *Limitations and Safeguards in Arms Control Agreements*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 247 (Lori F. Damrosch & David J. Scheffer eds., 1991).

195. *See generally* BROWNIE, *supra* note 85, at 261-64; BUILDER & GRAUBARD, *supra* note 72, at 31-32; SINGH, *supra* note 78; Greenwood, *Relationship*, *supra* note 135, at 223; O'Brien, *Legitimate Military Necessity*, *supra* note 87, at 88.

196. *Cf.* SINGH, *supra* note 78, at 135-36 (stating that if nuclear weapons are lawful, they are only lawful to repel nuclear attack). President Truman recalled wanting to use the atomic bomb against Japan in a manner consistent with the laws of war. HARRY S. TRUMAN, *MEMOIRS: YEAR OF DECISIONS* 420 (1955).

197. *See* MCDUGAL & FELICIANO, *supra* note 119, at 666-68. According to Dr. Singh, use is only necessary "when the target state, facing certain defeat, with a view to upholding the law and to prevent the aggressor from becoming victorious, after giving full trial to permissible weapons, uses prohibited nuclear weapons as a last resort against the law-breaker." *Id.* at 244.

198. BROWNIE, *supra* note 85, at 262-63.

199. *See* BUILDER & GRAUBARD, *supra* note 72, at 29 (discussing relevance of laws of armed conflict to nuclear weapons targeting). Osgood and Tucker describe the argument of necessity as follows:

There are no limits to the measures that may be taken to preserve the state's independence and continuity. This is, and has always been, the crux of the argument of necessity. On this

result reflects the international community's experience that reciprocity has proved a more certain guarantee of non-use than prohibition.<sup>200</sup>

## V. CONCLUSION

The WHO request for an advisory opinion on the lawfulness of using nuclear weapons challenges the ICJ and poses awkward and complex questions. This Article concludes, as did the WHO Legal Counsel,<sup>201</sup> that the WHO lacks competence to make such a request. The U.N. General Assembly, however, now has requested an opinion that is even more far reaching than the WHO's request with respect to nuclear weapons. Although the Court may decline to render an opinion on nuclear weapons to an organ of the United Nations as well as to a specialized agency such as the WHO, the ICJ undoubtedly will find the requests difficult to refuse.

This Article has analyzed the merits of the WHO request. While the question raises a host of significant issues, the Article has focused on the central ones: the tension between the laws of war and the right to use force in self-defense, and the last five decades' effort to address the nuclear issue through bilateral and multilateral arms control treaties. In this context examination of the laws of war suggests that they pose no absolute bar to the use of nuclear weapons. No treaty specifically prohibits such use, although a substantial number seek to control and limit numbers, kinds, testing, and availability of nuclear weapons.

Regardless of legal restrictions, states will exploit nuclear weapons for political purposes, as evidenced by states centrally involved in the Cold War. One therefore must look elsewhere than the existing laws of armed conflict in order to control or eliminate nuclear and other weapons of mass destruction.<sup>202</sup> The law can assist in this task, but it cannot substitute for political arrangements that remove incentives to obtain and use nuclear weapons. Legal attempts to control weapons proliferation may clash with the inherent right of self-defense. Most states will sacrifice the law of armed conflict if the price of obedience is defeat or annihilation. Experience suggests that any effort to abolish war through the laws of war is doomed.

The international community has lived uneasily with the nuclear weapon since 1945. Elaborate law backed by criminal sanctions governs the initiation and conduct of military operations. Advanced technologies applied to war, however, increasingly raise questions about the adequacy and relevance of this law. Therefore, the international community should reconsider once revolutionary ideas and determine whether they are still valuable. The post-

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absurdly simple yet ultimately terrifying conclusion there must be complete clarity. It is not the abuse to which the plea of necessity so readily lends itself that constitutes its profoundly disturbing feature but its refusal to acknowledge any restraints on the measures that may be threatened or taken on behalf of the state.

OSGOOD & TUCKER, *supra* note 129, at 289.

200. See ARMS CONTROL AND DISARMAMENT AGREEMENTS, *supra* note 99, at 9-11 (noting U.S., U.K., U.S.S.R., and French statements of intent to respect 1925 Geneva Protocol as long as enemies did).

201. See *supra* text accompanying notes 41-45.

202. The same is true with respect to controlling weapons, such as flamethrowers, that are not weapons of mass destruction.

Cold War international community has reached a consensus about the meaning of the U.N. Charter and its rules regarding force. While this consensus holds, the international community should reexamine plans for international control of nuclear processes, such as the 1946 Baruch Plan. The Plan still may be too invasive of sovereignty and too far ahead of the political maturity of the international community. Yet, the international community needs something like the Baruch Plan to control nuclear dangers. Otherwise, nuclear peace and security will continue to depend on diplomacy, military efforts, hard work by the Security Council, and good luck.

An ICJ opinion that the use of nuclear weapons is unlawful would have little constructive effect. States seeking to obtain nuclear weapons for purposes other than self-defense would not be deterred; states that might rely on such weapons for ultimate security against hostile states might find their security undermined. An opinion that the use of nuclear weapons would be lawful might have the consequence of encouraging proliferation and use in armed conflict.

In addition, the central role of nuclear weapons in international affairs since 1945 means that any opinion regarding nuclear weapon use would place the ICJ in the center of political controversy. ICJ participation in the nuclear question would put its reputation at risk with no advantage either to itself or the international community.

The Court may conclude that it must respond. Out of respect for the process by which international law is made, it should conclude that the law does not yet prohibit the possession, lawful threat, or lawful use of nuclear weapons.

